CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF LOUISIANA,

IN THE

EASTERN DISTRICT, AT NEW ORLEANS, COMMENCING, NOVEMBER, 1842.

PRESENT:

HON. FRANÇOIS XAVIER MARTIN.
HON. HENRY A. BULLARD.
HON. ALONZO MORPHY.
HON. EDWARD SIMON.
HON. RICE GARLAND.

JOHN KELLAR *v.* THOMAS WILLIAMS.

On a rule against one who had been appointed, by consent of parties, to receive and sue for all debts due to the partnership of which plaintiff and defendant were members, to show cause why he should not pay the amount so received by him into court, he may introduce evidence to show that he had paid debts due by the partnership, without first showing any authority to do so from the parties, or from either of them. A party cannot be controlled as to the order of introducing the testimony in support of his case. The authority to pay might be afterwards proved.

Though a receiver, appointed to collect money due to the parties to a suit, have no authority to pay debts due by them, yet if they know that he is doing so, and do not object at the time, they cannot do so afterwards.

Where, on the motion of one of the parties to a suit, with the consent of the other, a third person is appointed by the court to receive and sue for all amounts due to the litigants, on giving bond, with security, to hold the amounts so received subject to the order of the court, he will not be considered an officer of the court, but the agent of the parties, and only responsible as such. The appointment is the act of the parties.

Kellar v. Williams.

APPEAL from the District Court of the First District, *Buchanan*, J.

GARLAND, J. On the 6th of July, 1836, Kellar commenced a suit against Williams, alleging that they were partners in business, and that by the bad management and misconduct of the latter, the partnership affairs were in great confusion, his interests sacrificed, and the firm rendered insolvent. He prayed for the dissolution of the partnership, to which, he alleges, Williams is largely indebted, for a settlement of the accounts, and for a judgment for $5000 damages. The next day Williams commenced a suit against Kellar, making various allegations against him, also praying for a settlement of their accounts, for a dissolution of their partnership, and for a judgment for a balance due. Kellar, in his petition, prayed that Williams might be held to bail for his appearance, and the latter, in return, prayed in his petition, that all the property might be sequestrated, with both of which requests the judge below complied. Having thus got all their property and accounts into a situation in which neither could do any thing with them, and having the prospect of a litigated and protracted suit before them, on the 30th of July, 1836, the counsel of Kellar, in the presence of and without objection from the counsel of Williams, moved the court, that "Thomas Powell be appointed receiver of the moneys and debts due to the firm of Williams and Kellar, with power to sue for and recover the same," on his giving bond and security in a sum fixed, with condition that he should "have the moneys received by him, forthcoming, and subject to the further order of the court." The books and papers were ordered to be delivered to this receiver.

It appears from the record, that, on the 14th March, 1837, the case of *Williams* v. *Kellar* was called for trial, and a judgment of nonsuit entered; yet it is now argued as if that case were pending, although no appeal was taken from the judgment. Some short time afterwards, auditors were appointed to adjust the accounts in the case of *Kellar* v. *Williams*, but not having acted, after a lapse of nearly two years, others were appointed, who in March, 1839, made a report, which in March, 1840, was homologated, but shortly afterwards set aside, and again referred to the same auditors, who, in June of the same year, presented another

report, by which it appeared that Kellar was a creditor of the firm, and Williams considerably indebted to it.

To this report, Williams made opposition on various grounds, which are yet undecided; but in no part is it specially alleged, that he is not a debtor. Kellar, who is a creditor of the firm, prays that the report may be homologated, but no trial has yet taken place on that question. Some months afterwards, the counsel of Williams, although, as appears by the report of the auditors, his client was largely indebted to the firm, took a rule on Powell, who had been appointed receiver for the firm of Kellar and Williams, to show cause why he should not pay into court the sum of $12,101 47, money collected by him for the firm, and render an account of the moneys received by him as receiver. To this rule Powell answered, that he had collected about the sum mentioned, but that at the request of both Williams and Kellar, he had paid various debts of the firm, which had exhausted all the funds in his hands, and left a large balance in his favor. With this answer, an account in detail of the payments made was presented, to which both Kellar and Williams made opposition, on the grounds, that the payments were improperly made, as Powell had no right to make them; that the debts he pretended to have paid, were not those of the firm; and, lastly, that no payments were ever made at all. With this account, a great number of vouchers were filed, to prove debts and payments. The judge below rejected them all, and directed Powell to pay into court the sum of $12,101 47, stating that the proof of the payment of debts was inadmissible, unless the consent of both or one of the parties was shown. That such payments might give Powell the rights of a creditor by subrogation, but could not be urged as an answer to the rule, which alone concerns the accountability of an officer of the court. From this judgment Powell has appealed.

Our attention is first directed to various bills of exception, taken by the counsel of Powell, on the trial. The first states that Powell offered to prove that he had paid the debts of Kellar and Williams, and that the debts were justly due as set forth in the account filed, which evidence the court rejected, unless Powell should first show that Kellar and Williams, or one of them, had agreed to the payment of each note and account so paid.

It has been often held by this court, that parties ought not to be controlled as to the order in which they may choose to introduce their testimony; therefore, the court below ought not to have rejected evidence of the reality and validity of debts owing by Kellar and Williams, and paid by Powell, because it was not first proved that such payments were made by the consent of one or both of the parties. This might have been shown afterwards. It is very certain that, under the appointment of Powell, as first made, he had no right to act as a liquidator of the firm, and pay such debts as he thought proper to admit, as due by it; but if he were afterwards authorized to do so by the parties, or if they knew that he was doing so and did not object to it at the time, they cannot now object, and say that he is not entitled to a credit for the payments made for their benefit. They must not enrich themselves at his expense; nor have they a right to compel him to pay money into court, and let it remain there until he shows that he has a right to take it out again. In the rule taken on the appellant, it is not alleged or pretended that the money is in unsafe hands, nor that the bond and security given are insufficient, nor that there is any danger of the amount being lost. The party is simply called upon to show cause why he should not pay it into court; and we think it a very good answer, that he has applied the amount to the benefit of the firm whose agent he is. We will not say, at this time, what effect the evidence given, as to the assent of Kellar and Williams to the payment of the debts, ought to have; but we are of opinion that the District Judge mistook the capacity in which Powell acted. We do not regard him as an officer of the court, but simply as the agent of the parties, and entitled to show that he has faithfully acted as such. If his powers have been exceeded, he must be responsible; but until that is shown, it is not proper to force him to pay first, and try his case afterwards. We think the judge erred in rejecting the testimony.

The second bill of exceptions is, in principle, the same with the first. It is taken to the refusal of the judge to permit certain judgments against Kellar and Williams, paid by Powell, to be given in evidence, unless it were first shown that the partners, or one of them, had authorized their payment. We think the judge erred, in rejecting the evidence. The third bill of exceptions, is

to the refusal of the judge to permit the books of the firm to be given in evidence, to prove its insolvency, and the justice of the debts paid. We think the judge again erred. One of the allegations in Kellar's petition, is, that the firm is insolvent, and we can see no possible objection to giving the books in evidence to to prove it, and the justice of the debts paid for the firm.

As to the authorities urged upon us, as to the powers and duties of receivers in courts of chancery, we think, if entitled to any weight, that they are not applicable to the present case. A reference to the appointment of Powell as receiver, will show that it was the act of the parties themselves; and the minute or record book was used, to record the authority conferred. The want of confidence between the parties made it necessary to appoint an agent to settle their affairs, and he is only accountable as other mandataries.

As to the argument, that the issues in this case have been changed, or a new direction given to them, we can only say, it is the act of the parties themselves. They have provoked this controversy with Powell, which does not in any manner arrest the decision of the case between themselves, if they choose to go on with it. Nor does the complaint of the injury that creditors might sustain, by sanctioning Powell's course, seem to us entitled to consideration, as no such persons present themselves to claim our protection. When they do so, it will be time enough to take care of their interests.

If it be true, as suggested by the judge, that Powell has been subrogated to the rights of the creditors he has paid, this case is similar in principle to that of *Rodriguez* v. *Dubertrand*, 1 Robinson, 535.

The judgment of the District Court is, therefore, reversed; and the cause remanded for a new trial, with directions to the judge to admit the evidence stated to have been rejected in the three bills of exception, and otherwise to proceed according to law; the appellees paying the costs of this appeal.

C. M. Jones, and *L. Peirce*, for the appellant.

Hoffman, contra.

Joseph W. Meeks *v.* Joseph E. Davis.

The holder of an accepted draft for a sum payable in the notes of a particular Bank, protested at maturity, will be entitled to recover the value of the notes at the date of the protest. A subsequent tender of the amount in the notes of the Bank, they having depreciated in the mean time, will not entitle the defendant to settle the debt, at the value of the notes at the date of the tender.

Appeal from the Commercial Court of New Orleans, *Watts*, J. This was an action against one of the acceptors, by the payee of a bill, for $434 25, payable "in funds equivalent to Mississippi Union Bank post notes," protested at maturity, on the 3d June, 1839. The defendant averred that he had always been ready to pay the bill, and that he had actually rendered the amount to the agent of the plaintiff. On the trial, Nicholson testified, that he had presented the bill to the defendant, on the 29th December, 1840, and demanded payment; that the latter offered him Mississippi Union post notes, dollar for dollar; and that these notes were then at a discount of from 60 to 70 per cent. Witness did not know the value of these notes on the 3d of June, 1839, but had seen from an entry in the books of certain brokers that they had sold them, on the 8th of August, 1839, at a discount of seven per cent. Grant, a broker, testified, that he had sold the notes in Mississippi, about the middle of May, 1839, at six per cent discount; that they had been sold in New Orleans, on the 20th of that month, at from five to eight per cent; and that in December, 1840, they were at a discount of thirty or forty per cent. Egerton, another broker, deposed, that in May and June, 1839, the notes were sold at from five to ten per cent discount. There was a judgment for the full amount of the bill, with interest and costs of protest, in specie; and the defendant has appealed.

Emerson, for the plaintiff. The value of the notes at the maturity of the draft, is the standard by which to fix the amount due. Civ. Code, art. 2148.

Preston, for the appellant.

Martin, J. The petition states, that the plaintiff being the holder of an order or bill, by which the defendant was required to pay the sum of $434 25, in funds equivalent to Mississippi Union

Bank post notes, the latter accepted the same. At the maturity of the bill, which was payable, one day after sight, at the Commercial and Rail Road Bank of Vicksburg, the plaintiff presented it there for payment, which, not being made, it was duly protested. The answer admits the defendant's liability to pay the amount stated on the face of the bill, and avers his constant readiness to do so. The plaintiff had judgment for the amount of the bill, interest and costs, and the defendant has appealed. The bill was accepted on the 30th of May, 1839, and protested on the 3d day of the following month. On the back of it is an endorsement, dated December 29th, 1840, which states, that, on that day, John L. Nicholson presented the bill to the defendant, who tendered him the amount of principal and interest in Mississippi Union Bank post notes, answering the description of those named in the draft, which was refused. Nicholson deposed according to what he had written on the back of the bill; and, farther, that the defendant offered him a $500 Union post note, and requested him to take thereout the amount of the bill. The defendant offered Union post notes, dollar for dollar, which were at the time at a discount of from sixty to seventy per cent. Defendant gave evidence of the value of the Mississippi Union Bank post notes on the day of the protest; and the judgment is for the value of the amount of the bill on that day. The defendant's counsel has contended that the court erred, and that the judgment ought to have been for the value of the notes on the day on which the first application for payment was made to him. He contends that the document sued upon is not a bill of exchange, it being of the essence of such a bill that it should be payable in money, and not in anything else; and that it is a contract for the delivery of a specific article, for the non-delivery of which no damages can be claimed from him, unless he has been legally put *in mora*, before the institution of the suit. The plaintiff's counsel has replied, that a protest by a notary public is one of the modes pointed out by the Civil Code, art. 1905, for putting the debtor *in mora*. The protest in the present case has been admitted in evidence, without opposition on the part of the defendant. The judge, therefore, did not err in giving judgment for the plaintiff.

Judgment affirmed.

Harriet Marshall *v.* Michael Mullen and others.

Real property purchased during the existence of the community of *acquêts*, but conveyed to the wife, will be liable for debts contracted by the husband, unless proved to have been paid for out of the paraphernal funds of the former.

Appeal from the Commercial Court of New Orleans, *Watts*, J.

Roselius, for the appellant.

A. Hennen, for the defendants.

Garland, J. The defendants, having obtained a judgment against James Marshall, had an execution, issued under it, levied on a valuable lot of ground in this city, whereupon the plaintiff obtained an injunction, alleging the lot to be her paraphernal property, that she had been separated in property from her husband, and that the lot was not liable for his debts. The defendants deny all the allegations, and charge fraud and collusion between the plaintiff and her husband.

In the court below, it was clearly shown that the lot in question was purchased during the existence of the community of *acquêts*, but conveyed to the wife. It was also attempted to be proved, that it had been paid for with her paraphernal funds; but the judge thought that allegation not sufficiently established, and dissolved the injunction. The plaintiff, also, relied upon her judgment of separation of property, but was met by the objections that it had never been advertised or executed according to law, and that it was not of itself evidence against the defendants, they having charged fraud and collusion between the parties, and the judgment being one by confession. From the judgment dissolving the injunction, the plaintiff has appealed.

We are of opinion that the inferior judge did not err. We can find no evidence to satisfy us that the lot was paid for out of the paraphernal funds of the wife. The deed of sale does not show it with any certainty, and there is no other evidence to prove it. In his written argument, the present counsel for the plaintiff states, that he is informed that such evidence was given in the court below; but it is not in the record, and the clerk and judge certify that it contains all the evidence upon which the cause was tried.

As the case now stands, all the principles involved in it have been settled in the cases of *Terrell* v. *Cutrer*, and *Bertie* v. *Walker*, 1 Robinson, 367, 431.

Judgment affirmed.

ROBERT H. THORNE and another *v.* BRIDGET EGAN and Husband.

A married woman, who is a public merchant, may bind herself for any thing relative to her trade, without being empowered by her husband; and in such a case, if there be a community of *acquêts* the husband will be also bound. C. C. 128. Otherwise, if not a public merchant.

The authorization of the husband to the commercial contracts of the wife, is presumed by law, whenever he permits her to trade in her own name. C. C. 1779.

The wife cannot deprive the husband of the right to administer her dowry. He administers it for his own account, and not as her agent, and is not accountable to her for the profits or revenues derived from it. C. C. 2329, 2330. His obligations are those of an usufructuary. C. C. 2344. Debts contracted by him, during the marriage, as administrator of the dowry, are personal to him, and cannot bind the wife, if she renounce the community. C. C. 2379.

APPEAL from the District Court of the First District, *Buchanan*, J.

Eggleston and *L. Peirce*, for the appellants.

Molloy and *Preston*, for the defendants.

MORPHY, J. The defendants are sought to be made liable on a promissory note signed by Bridget Egan alone. It is alleged in the petition, that, at the time of its execution, there existed between the defendants a community of *acquêts* and gains; that Bridget Egan was a public merchant and trader, residing and transacting commercial business in the city of New Orleans; and that the note sued on was given by her in reference to her business and trade. The answer denies that Bridget Egan was a public merchant at the time she signed this note, (twenty-sixth October, 1840,) or that she had transacted any commercial business since her marriage with Owen D. Egan up to the period of her separation of property from her husband, in the autumn of 1841. It avers that the note was given to secure a debt, contracted by Owen D. Egan in the business in which he was engaged, and of which he had the sole

management. There was a judgment below in favor of the defendants, reserving to the plaintiffs their action against Owen D. Egan, for goods sold and delivered.

Had the facts set forth in the petition been supported by evidence, they would have presented a clear case in favor of the plaintiffs. Under our law, the wife, who is a public merchant, may, without being empowered by her husband, obligate herself in any thing relating to her trade; and in such a case her husband is bound also, if there exist a community of goods between them. The authorization of the husband to the commercial contracts of the wife, is always presumed by law, when he permits her to trade in her own name. C. C. arts. 128, 1779. There is no evidence in this case, that Bridget Egan was a public merchant, when she signed this note, on the twenty-sixth of October, 1840. It appears, on the contrary, that since her marriage, which took place on the thirtieth of December, 1837, the business which she had until then carried on in her two clothing stores, was exclusively managed and conducted by her husband, whose name was put on the door of the stores; and that the plaintiffs, who formerly kept their account with her, as the widow of one Finney, then kept it in the name of Owen D. Egan.

The counsel for the plaintiffs have contended that, as the two stores which she owned before her marriage, and which she settled upon herself as a dowry, were appraised, with a declaration that the valuation was not intended to transfer the property to her husband, she continued to be the owner of these stores; that, if the business in them was afterwards carried on by Owen D. Egan, in his own name, he must be considered as her agent in their management; and that she is liable, as the goods for which the note was given were placed in her stores, and thus enured to her benefit. It is clear that, as the law entitles the husband to the administration of the dowry, and as the wife cannot deprive him of it, he administers her dotal property for his own account, and not as her agent, and is not accountable to her for the profits or revenue he may derive from it. His obligations are those of an usufructuary. The clothing stores, which formed the dowry in this case, could not be otherwise used or administered, than by retailing the goods in them at the best possible prices, and renewing

the stock from time to time so as to do a profitable business. This the husband was unquestionably authorized to do. The debts which he may have contracted during the marriage, for the fulfillment of his obligations as administrator of the dowry, are personal to him, and cannot be binding on the wife, if she sees fit to renounce the community. C. C. arts. 542, 2329, 2330, 2344, 2379. It may be doubted whether, from the nature of the property brought in marriage by Bridget Finney, the valuation did not necessarily transfer it to the husband, notwithstanding the declaration that it was not intended to have that effect. But, be this as it may, it is clear, that a married woman is without capacity to contract, without the assistance of her husband, unless she be a public merchant carrying on a separate trade. The business in reference to which this note appears to have been given, was transacted by the husband alone; the wife had no share whatever in it, nor had she any right to interfere with it. She could only claim a restoration of the property, or its value, in a suit for a separation of property from her husband on showing, as she has done, that her dowry was in danger. C. C. art. 2399. As to Owen D. Egan, the judge below was of opinion, and we think correctly, that under the pleadings and evidence no judgment could be rendered against him in this suit. He was no party to the instrument sued on; and the plaintiffs have utterly failed to make out the legal grounds on which alone he could be held liable on it.

Judgment affirmed.

WILLIAM H. COOK and another *v.* WARREN WEST.

A vendor may refuse to deliver the thing sold, though he may have granted a term for the payment, where, from the absconding of the vendee, he would be in imminent danger of losing the price. C. C. 2464.

A sale is perfect, between the parties, as soon as they agree as to the thing and the price. As to third persons, the property of the thing sold passes to the vendee, only by delivery.

A vendee who has not received the thing sold, nor paid the price, can transfer to a third person only his right to require the delivery of the thing on the payment of the price, or on giving security for its payment at the time agreed on.

Cook and another v. West.

One who stands by and sees his property sold as belonging to another, will not be permitted to set up his title in opposition to a *bona fide* purchaser, who has bought on the faith of his declarations or apparent acquiescence. *Aliter*, where the purchaser knew the extent of the rights of the claimant, and was not misled by the acknowledgments so made.

APPEAL from the District Court of the First District, *Buchanan*, J.

Preston, for the appellants.

Warfield, for the defendant.

MORPHY, J. The petitioners claim, as their property, forty-six tons of hay, being the balance of a flat-boat load of that article, supposed to have contained about sixty tons, which they state that they purchased from one Elijah J. Wood, at the price of $21 per ton. They aver that only fourteen tons of hay have been delivered to them, and that the forty-six remaining tons are in the possession of the defendant, who wrongfully detains the same. They pray for a writ of sequestration, and for judgment in their favor for the forty-six tons of hay, or the value thereof, to wit, $966. The defendant sets up title to the hay in his possession, denying that either the plaintiffs, or E. J. Wood, have any right to it. The court below gave judgment in favor of the plaintiffs for the forty-six tons of hay, or its value, $966; but subject to a deduction of $920 for the defendant's privilege as vendor upon the property sequestered. The plaintiffs have appealed.

The record shows that, on the 24th of January, 1838, the defendant, being at Vicksburg, sold to one Elijah J. Wood, a flat-boat and its cargo of hay, at the rate of $20 per ton for the hay, and $55 for the boat, payable in United States paper, when delivered in good order at New Orleans, and for which the seller was to wait three days, but that he received an advance of $150. That a day or two after the arrival of the boat at the levée in this city, Wood sold the hay to the plaintiffs at $21 per ton, informed the defendant of the fact, and told him that he might commence rolling out the hay. When the defendant had delivered about ten tons, he told Wood that he wanted more money before he put out the hay. Wood promised to go to the plaintiffs and get some, which he would change into United States money, and give him in the afternoon. Under this assurance, the defendant con-

tinued rolling out the hay until he delivered about fourteen tons, which were taken away by Barrett, one of the plaintiffs; but defendant refused to deliver any more hay, when he found that Wood was not likely to return. The latter, it appears, had gone to the plaintiffs, and obtained from them, as an advance on the hay, $700, with which he absconded, instead of giving the money to the defendant.

It is clear that, although the sale had become perfect as between the defendant and Wood, as soon as they agreed as to the thing sold, and the price to be paid for it, the former was justified by law in refusing to deliver the hay, his vendee having absconded, thus putting him in imminent danger of losing the price. It is equally clear that, as relates to third persons, the property of the thing sold does not pass to the vendee, till after delivery. Wood could transfer to the plaintiffs only his right of requiring the delivery of the hay on paying the price, or on giving security to pay it at the time agreed on. Civ. Code, arts. 2463, 2464, 2483. 9 Mart. 592. But it is urged that the sale was made by Wood to the plaintiffs, in the presence of the defendant, who, before the sale, represented the hay as Wood's property, and did not inform them that he had any lien or claim upon it. If this circumstance were alone considered, it would probably be conclusive against the defendant; for no man should be permitted to stand by and see his property sold, and, after a *bona fide* purchaser has paid his money on the faith of his declarations or apparent acquiescence, set up his title in opposition to such purchaser. But, in this case, the testimony shows, that the plaintiffs knew perfectly well the extent of Wood's right to the property, and were not misled by the defendant's acknowledgment of such right. It is shown that, on the defendant's refusal to continue putting out the hay, they advanced to Wood $700, for the purpose of paying the defendant, well knowing that he could withhold the balance of the hay, which he had begun to deliver to them at the request of Wood. The hay being yet in the possession of the vendor of their vendor, they did an imprudent act in advancing to the latter a greater proportion of the price than was then due. In doing so they trusted Wood, and must abide the consequences of his dishonesty, in the same manner as the defendant must lose the value of the hay he

delivered, over and above the sum he received from his vendee. As to the residue of the hay which remained in his possession, he was entitled to retain it until it was paid for, and Wood had acquired no absolute right to it which he could transfer to the plaintiffs.

LEVI H. GALE *v.* J. W. THOMPSON.

APPEAL from the District Court of the First District, *Buchanan*, J.

Carter, for the appellant.

Benjamin, for the defendant.

BULLARD, J. The plaintiff is appellant from a judgment rejecting his claim for damages against the defendant, captain of the ship Bowditch, for the non-performance of his contract to pay the plaintiff commissions for procuring a full freight for his vessel to Havre. The plaintiff, who is a ship broker, alleges that he offered to comply with the contract on his part, but that it was violated on the part of the defendant. It is not disputed that the full freight would have amounted to upwards of twenty thousand dollars; and the commission was five per cent.

We concur in opinion with the Judge of the District Court, that the commissions were promised upon condition, that the plaintiff should furnish guarantees of shippers, for a full freight at two and a half cents per pound for cotton. The only question, therefore, is, whether such guarantee was furnished. The document which it is contended amounts to a guarantee for the balance of the freight not previously engaged, is signed by the plaintiff himself. It is in the following words: "I hereby agree to fill up the ship Bowditch, all over and above one thousand bales at two cents and one half a cent freight, for Havre." On the back of this paper is the signature of F. Ganahl & Co. The latter refused to give any explanation as to their intention when they endorsed the paper. Admitting that the holder of such an instrument, would have a right to fill up the blank with any promise not inconsistent with

that expressed on the face of it, yet it would amount, in this case, to nothing more than a securityship, or an engagement to guaranty the contract made by the plaintiff. But it appears to have been the guarantee of shippers which was required, and not mere security that the plaintiff would comply with his contract to procure a freight. The instrument does not set forth any new contract on the part of Gale. It merely expresses in writing his previous promise to procure a full freight. It is not pretended that he had any cotton of his own to ship, nor did Ganahl & Co. engage to ship the balance of the cotton over and above one thousand bales. But even supposing this was substantially the guarantee required, and that the offer of a check for $3000 to complete the full, guarantee, was, *pro tanto*, a compliance with the condition, yet it does not appear to amount to a full guarantee for the entire cargo, because there was no positive agreement on the part of Chatenat to ship five hundred bales, which would have completed the cargo. The number of bales he was to furnish was not definite.

Upon the whole, we are not satisfied that the court erred.

Judgment affirmed.

BENJAMIN HARROD and another *v.* ELIHU WOODRUFF and another.

Art. 3499 of the Civil Code does not apply to shipwrights who undertake to build or repair ships or other vessels, whether under a contract for a stipulated sum, or otherwise. It applies only to the claims of workmen or laborers for their daily or monthly wages, and to the sellers of materials for the price thereof, against the person with whom they contract directly, whether the owner or undertaker.

APPEAL from the District Court of the First District, *Buchanan*, J.

MORPHY, J. This is an action to recover a balance due on an account for work and labor done, and materials furnished in repairing the steam boat Caspian, belonging to the defendants. After a general denial of indebtedness, the owners of the Caspian

allege, that the plaintiffs, who are shipwrights, undertook and agreed to repair their boat for $1600, and they annex to their answer the contract entered into between them to that effect. They aver that the plaintiffs, in making the repairs, acted so negligently, and provided such defective ways, that the boat fell to the ground, and was thereby so much strained and injured, that they had to pay the plaintiffs to repair her upwards of $4000, which the petition of the latter admits that they received. They further plead the prescriptions of one and three years, and, by way of reconvention, pray for damages. The plea of prescription was sustained below; whereupon, the plaintiffs appealed.

The contract referred to in the answer, after specifying the main repairs which were to be made for $1600, provides that any other work shall be extra, and charged at customary prices. The judge below was of opinion that, as it appeared from the account of the plaintiffs, that the stipulated sum had long since been paid, the balance of the claim yet unpaid, which was on a bill of particulars for supplies of materials and labor, fell within the prescription of one year, provided by article 3499 of the Civil Code.

In deciding the question of prescription, to which we propose to confine our attention, it is unnecessary to determine whether all the charges in the account are covered by the contract, or whether they have partly been rendered necessary by the alleged negligence of the shipwrights, and the insufficiency of the preparations made to haul up and block the boat for the purpose of the intended repairs. The article of the Code relied on does not, in our opinion, apply to shipwrights who undertake to build or repair ships or other vessels, whether under a contract for a stipulated sum, or on a *quantum meruit*. It contemplates, we think, only the claims of the workmen and laborers for their daily or monthly wages, and those of the sellers of raw materials for the price thereof, against the persons with whom they contract directly, whether it be the owner himself or the undertaker; but those who, like the plaintiffs, undertake to build or repair a vessel, are neither workmen or laborers claiming their wages, nor are they the furnishers of wood or other materials claiming the price thereof. In the execution of their undertakings, they employ mecha-

nics of different trades, and procure the wood, iron, and other necessary articles; and their remuneration is compounded of the wages they pay to these people, the disbursements they make in purchasing every thing necessary, the use of their yards and ways, and their personal trouble and care in superintending the whole work. Their claim, although presented in the shape of a bill of particulars, where there has been no sum agreed on for the job, is one entire claim for the construction or repairs they have undertaken; and no particular items, either of labor done or materials furnished, can be taken or singled out of their account, and subjected to the short prescription of one year. The decision now made accords with our former adjudications on this article of the Code. 6 La. 393. 10 La. 230. 19 La. 413. The judgment of the inferior court being based entirely on the plea of prescription, and the matters of fact involved in this controversy not having been passed upon below, we have thought it best to send the case back for a trial on its merits.

It is, therefore, ordered, that the judgment of the District Court be reversed, and the plea of prescription overruled; and it is further ordered, that this case be remanded for further proceedings according to law. The costs of this appeal to be borne by the defendants and appellees.

I. W. Smith, for the appellants.

Preston, for the defendants.

ROBERT ABBOTT *v.* F. GANAHL and another.

APPEAL from the Commercial Court of New Orleans, *Watts*, J.

Carter, for the plaintiff.

L. C. Duncan, for the appellants.

BULLARD, J. The plaintiff, who is the lessee of a cotton press, sues to recover of the defendants $365 25, for drayage, labor, and rope and bagging. The defendants, after denying the justice of the claim, demand in reconvention about six hundred dollars, for damages sustained by their cotton through the fault of the plain-

tiff. There was a judgment for a part of the plaintiff's demand, and the defendants have appealed.

The case turns wholly upon questions of fact. The damage sustained was occasioned by a part of the cotton being left exposed to the weather. This appears to have been done with the consent of the defendants, although the original agreement was that it should be under shelter. The District Court rejected the claim of the plaintiff for storage of such parts of the cotton as was thus left exposed, and gave judgment in his favor for the balance. We are not satisfied that it is our duty to reverse the judgment.

Judgment affirmed.

JACOB SCHOLLINGER CONKLIN *v.* GEORGE G. KIRK and another.

APPEAL from the City Court of New Orleans, *Cooley*, J.

This case was submitted, without argument, by *Conklin, pro se*, and *Haynes*, for the appellant.

SIMON, J. An execution, issued at the suit of the defendant Kirk, against John Kellar, was levied on the 13th of September, 1841, by the marshal of the City Court, on certain household effects and furniture, as the property of Kellar, in a house then rented and occupied by the plaintiff, but which had been previously occupied by Kellar.

Plaintiff obtained an injunction to stop the sale of the property seized, on the ground that it belonged to him at the time of the seizure, he having purchased it, or a part thereof, from John Kellar, on the 8th of August preceding, for a good and valuable consideration. He prayed that the property might be adjudged to belong to him, and for judgment against the marshal, and Kirk, for the sum of two hundred dollars damages.

The marshal joined issue by pleading a general denial, and averring that he was in good faith when he made the seizure, and that previous to levying the execution, he took an indemnity bond from Kirk, with certain persons as his securities, whom he prayed might be cited in warranty.

The defendant Kirk, also pleaded the general issue, and further averred that, if any sale was made of the property seized, by Kellar to the plaintiff, it was fraudulent.

After a full investigation of the facts adduced by both parties in support of their respective pretensions, the inferior judge came to the conclusion that the property in dispute really belonged to the plaintiff, and made the injunction obtained by him perpetual. From this judgment, the defendant Kirk has appealed.*

The evidence shows that on the 8th of August, 1841, Kellar sold to the plaintiff, by an act under private signature, certain articles of household furniture which are comprised among those seized by the marshal. The consideration is therein stated to consist in the amount of two drafts which had been accepted but not paid, and which had been given in settlement for professional services; and in another sum due for professional services, rendered by the plaintiff, who is an attorney at law, to John Kellar, his client, at different times and in divers law suits. It appears that the plaintiff took immediate possession of the articles sold; that on the day of the purchase, he rented the house in which they were left by Kellar, who was the former tenant; that plaintiff brought there other effects and furniture, which he had at his former residence; that he continued to live there, and remained in possession of all the household effects and furniture, subsequently seized by the marshal; and that when the execution was levied and the inventory made, the marshal found the plaintiff in possession of the house. The deputy marshal, who made the seizure, being examined as a witness, states that, among other things, he saw a table and *armoire*, with books on the table and in the *armoire*, marked *Conklin*.

The defendant has also attempted to show that Kellar was at the time of the sale in insolvent circumstances to the knowledge of the plaintiff, and that the sale under consideration should be revoked and set aside, as giving an undue preference to the plaintiff over the other creditors of Kellar, and as being a fraud on the said creditors. This point is not presented at all by the pleadings, and perhaps should have been disregarded below; but even supposing that it could have been taken into consideration, we think, with

* No damages were allowed.

the judge *a quo*, that the defendant has entirely failed to make out Kellar's insolvency, or to prove any of the facts necessary to be adduced in support of the revocatory action by which he tried to establish his defence. Kellar was not insolvent. Nothing shows the amount of his debts. On the contrary, his solvency appears to have been established by all the witnesses, but one, who was examined at the request of the defendant, and whose testimony the lower judge found so inconsistent and contradictory, that he thought it to be entitled to very little weight. This evidence, we also think, was very properly disregarded.

On the whole, we are of opinion that the judgment appealed from is correct. The date of the sale is sufficiently established by all the surrounding circumstances; and as this case presents merely a question of fact for our solution, were it left doubtful, we should not consider ourselves authorized to disturb a judgment which was rendered after the case had undergone the fullest and most minute investigation. We are satisfied, however, that the facts support the plaintiff's demand, and that the defendant has failed to make out his defence.

Judgment affirmed.

THOMAS B. HARRISON and Wife *v.* D. F. WAYMOUTH and Wife.

A bill of exceptions is only necessary, where something is to be brought to the knowledge of the appellate court, which would not otherwise appear in the record.

In an affidavit for a continuance, on the ground of the absence of a witness, a statement "that the witness has left the city for a few days," is equivalent to an allegation that he is expected to return at the expiration of that period, and will be sufficient.

Where, on an application for a continuance, defendant swears, that he expects to prove by a witness, who is absent, "that plaintiffs had caused great damage to him by their illegal conduct, that he is not indebted to them, and that he cannot safely go to trial without his testimony," the circumstance of his having other witnesses to the same facts, ought not to deprive him of the benefit of a continuance; for the absent witness might have the means of speaking more positively than the others.

APPEAL from the Commercial Court of New Orleans, *Watts*, J.

MARTIN, J. The defendants and appellants complain that a continuance was incorrectly refused to them. They claimed it on

an affidavit, that they could not safely proceed to trial without the testimony of Lawrence Finnick, by which they expected to prove the allegations in their answer; that they left the name of said Finnick, to be summoned as a witness, and his domicil, according to the rules of the court relating to the summoning of witnesses; that the subpœna was left at the witness' domicil on the 16th instant, when they heard, for the first time, that he had left the city for a few days; and that the affidavit is not made for delay, &c. The plaintiffs' counsel contend that the defendants cannot urge this matter in this court, because no bill of exceptions was taken to the refusal of the continuance below. We are ignorant of any necessity for a bill of exceptions in a case like this. Such a bill is needed only in those cases, where something is to be brought to the knowledge of this court, which would not otherwise appear.

The judgment informs us that the affidavit was insufficient, because it is not shown that the witness was expected to return, and there were several other witnesses, who lived in the house, to the same point to which his testimony was wanted. The judge, in our opinion, erred. Had the defendants sworn that they were informed that the witness was expected to return within a week or a month, this would have sufficed. They swear that they were informed that he had left the city, for a few days. This certainly means that he was expected to return, within that time. The circumstance of the defendants' having had other witnesses to the fact which they intended to prove by the absent one, ought not to have prevented the granting of the continuance, for it was not known, when the continuance was refused; and even had it been known, it would have been insufficient, for the absent witness might have the means of speaking more positively than those who attended; and this was impliedly attested in the affidavit, which states that, without the testimony of this witness, the defendants can not safely proceed to trial.

It is, therefore, ordered, that the judgment be reversed, and the case remanded for a new trial; the plaintiffs and appellees paying the costs of the appeal.

Micou, for the plaintiffs.

Carter, for the appellants.

Succession of Felix De Armas—Joseph Le Carpentier, Executor, Appellant.

Where a mortgage recites, that the mortgagor wishes to place the mortgagee "*à l'abri de ses avances d'argent, et des effets des endossemens que celui-ci voudra bien lui fournir,*" it will be considered as having been given to secure past, as well as future advances.

Acts granting mortgages will, in cases of doubt, be strictly construed.

Appeal from the Court of Probates of New Orleans, *Bermudez*, J.

Benjamin, for the appellant.

C. G. De Armas, contra.

Simon, J. Le Carpentier is appellant from a judgment rendered against him, in his capacity of dative testamentary executor of the late Felix De Armas, ordering him to pay to the petitioner the sum of four thousand three hundred and five dollars and seventy-one cents, with interest, as a mortgage creditor of the estate of the deceased, out of the proceeds of certain property described in the judgment.

The act of mortgage, on which the petitioner's claim is founded, appears to have been passed for the purpose of securing certain advances made by the petitioner, and to protect him against the effect of endorsements which he was to furnish to the deceased, the whole not exceeding twenty-five thousand dollars. The object of the passing of the act, is therein expressed in the following words: "*Lequel* (Felix De Armas) *voulant mettre M. François Alpuenté à l'abri de ses avances d'argent, et des effets des endossemens que celui-ci voudra bien lui fournir, jusqu'à concurcence d'une somme n'excédant pas celle de vingt cinq mille piastres,*" *&c.* It is contended, by the appellant, that the mortgage was merely given to secure *future* and *prospective* advances, and not to secure advances which had been *previously* made.

We cannot accede to this proposition. It seems to us that the expression used by the parties, "*à l'abri de ses avances d'argent,*" indicates satisfactorily that the advances alluded to had already been made, and that it was only necessary, for the purpose of ascertaining the amount thereof, to refer to the receipts or vouchers by

which the amount could be liquidated and established. Had the security been intended only to secure advances to be made *in futuro*, the terms used would perhaps have been, "*à l'abri des avances d'argent, et des endossemens que celui-ci voudra bien lui fournir*," and not "*de ses avances.*" Indeed, the latter expression shows that at the time of the contract, the petitioner was a creditor of the deceased for certain advances; and, we think, that, although the rule is, that acts granting mortgages, in cases of doubt, should always be strictly construed, the terms of the contract under consideration are such as to satisfy us, without any relaxation from the rule, that the intention of the parties was clearly to secure, not only advances which had been already made, but also endorsements which were to be subsequently given or furnished.

It has been urged, however, that the rights of the petitioner, as a mortgage creditor of the succession, cannot be decided in this suit; and that the probate judge should have merely liquidated the account, and established the balance for which the petitioner was to be placed on said account, leaving his rank to be settled on the filing of the account. This would have been perhaps the most proper and legal course originally; but it has been asserted in argument and not denied, nay, we have been referred to a record of this court, to show, that there was a suit pending before the inferior court in which the petitioner had filed an opposition to the appellant's account as executor, grounded on the judgment appealed from, and that the judgment to be rendered in the present suit, will have the effect of settling definitely the controversy resulting from the opposition yet undetermined. Under such circumstances, we see no reason why we should not pronounce at once upon the legal rights of the petitioner, and not subject the parties to further and useless costs and litigation.

The liquidation of the amount due to the petitioner has not been controverted, and the judgment of the lower court appears to us to have been correctly rendered.

Judgment affirmed.

JOHN FERGUSON and another *v.* J. P. WHIPPLE.

The admission of irrelevant testimony is no ground for remanding a case for a new trial, where its exclusion would not probably vary the result.

APPEAL from the Commercial Court of New Orleans, *Watts*, J.

Emerson, for the plaintiffs.

Winthrop, for the appellant.

MARTIN, J. The certificate of the clerk does not enable us to review the judgment, that officer attesting only that the transcript contains all the proceedings and all the documents filed in the cause. No testimony appears to have been taken down, and the case is only before us on a bill of exceptions, taken by the defendant and appellant, to the offer, by the plaintiffs, of witnesses to prove the personal habits of the defendant, and to show that he was becoming or was already addicted to intemperance, on the ground that such testimony was totally irrelevant, and had nothing to do with the question before the court. If the testimony was *totally irrelevant, and had nothing to do with the question before the court*, it ought not to have been admitted, because its admission could have no other effect than to consume uselessly the time of the lower court. It could not have injured the defendant's case. But this loss of time would not certainly be remedied by reversing the judgment, and remanding the case for a new trial. The absence of this objectionable testimony would not probably produce a different result.

Judgment affirmed.

Marie Joseph Beaulieu and others *v.* Frederick Furst and others.

A party against whom an order of seizure and sale had been issued, presented a petition alleging that the mortgage and notes were obtained by fraud, and that the mortgage was illegally executed, and praying for an injunction, for a judgment rescinding the act, for damages against the mortgagee and a third person alleged to have been concerned in the fraud, and for a trial by jury. The mortgagee answered, praying that the injunction might be dissolved, the demand rejected, and for a judgment in his favor for the amount of his debt. *Held*, that the causes of opposition not being confined to those enumerated in art. 739 of the Code of Practice, and the proceedings having been changed from the *via executiva* to the *via ordinaria*, the mortgagee must be considered as a defendant, in the proceedings to obtain the injunction; and that the other party, like other plaintiffs, was entitled to open and close the argument.

Appeal from the District Court of the First District, *Buchanan*, J.

Garland, J. In April, 1837, Furst sold to the Beaulieus a house and lot on the Bayou road, for $13,400, payable in twelve and eighteen months. They executed their notes for the price, and to secure their payment, gave an endorser, and a mortgage on the property sold, and on a tract of land on the Metairie road, in the parish of Jefferson, on which they resided. When the first payment became due, Furst presented his petition praying for an order of seizure and sale of the property on the Bayou road alone. The Beaulieus filed an opposition to this proceeding, alleging various grounds of nullity, either relative or positive, in the act of sale and mortgage, to which Furst filed an answer. This opposition was dismissed by the opponents. The property was sold by the sheriff, and brought a little more than the amount of the first note. When the second note became due, Furst presented what he called his supplemental petition, although the first order of seizure had been previously executed and the amount for which it issued fully satisfied, alleging that the second note had become due, and remained unpaid, and asking that such order and relief as was needful might be granted. The judge made no order on this petition, but the Beaulieus, by their counsel, accepted service of it, and filed an answer, reiterating all their objections to the first order of

seizure. Upon this the counsel of Furst discontinued his proceedings; but on the same day filed, by the leave of the court, another supplemental petition, setting forth, more specifically the previous proceedings under the first order of seizure and sale, the maturity of the second note, and the existence of a mortgage on the land on the Matairie road; and concluded by a prayer for a second order of seizure and sale, which was granted by the judge upon the filing of the second note.

This last writ was about being executed by the sheriff, when the Beaulieus presented a regular petition to the District Court, stating its existence, the attempts to execute it, and, after several allegations as to want of notice and demand of payment at the proper place, &c., they allege that the act of mortgage and notes were obtained by fraud, and other unlawful means, practiced by the agents of Furst, with his connivance. They aver that the act is null and void, because it was not executed before a notary public; that it was signed in the parish of Jefferson, where they reside, and where the notary, before whom it purports to have been executed, has no authority; that he was not present at the time; that all the persons who subscribed the act as witnesses did not see them sign it, and that but one of them was present. The petition then proceeds to state in what manner the alleged fraud was practiced; and concludes by a prayer for an injunction, for the setting aside of the order of seizure and sale, for ten thousand dollars damages, for the rescinding and cancelling of the act, and for a trial by jury.

A person named Favre Hazeur, who was alleged to be a principal agent in the fraud, was also made a party, and judgment for damages asked against him. Furst and Hazeur answered this petition and the interrogatories at great length, denying any fraud or collusion between them. The former denied most positively that the latter was his agent, giving a full detail of all the circumstances of the transaction. Furst concludes his answer by praying for a dissolution of the injunction, that the demand of the plaintiffs may be rejected, and that he may have a judgment in his favor, and for general relief.

The District Judge at first ordered the case to be put on the court docket, and proceeded to try it summarily; but after some in-

vestigation, he concluded that it was a case which properly belonged to a jury, and ordered it to be so tried. Four juries were unable to agree on a verdict, but the fifth found a verdict in favor of Furst, upon which a judgment was entered; and the Beaulieus have appealed.

Upon the trial several bills of exception were taken, to which our attention has been called.

The first, is to the opinion of the judge permitting the counsel for Furst to open and close the argument to the jury. They insisted, as Furst was the plaintiff in the application for the order of seizure and sale, that he continued to be so, and that the petition for an injunction should only be considered as an answer or opposition to their demand, and the answer of Furst to it, only as a replication, or answer to a demand in reconvention. The judge below so viewed the proceedings, and, by considering the Beaulieus as opponents only, decided they did not come within the meaning of the articles 476, 477, 485, of the Code of Practice, and the well settled rule, established by this court, that the plaintiff has the right of opening and closing the argument. If the causes of opposition were confined to those mentioned in article 739 of the Code of Practice, and the proceedings had not been changed from the *via executiva* to the *via ordinaria*, it is possible the judge would have been correct. But in this case, the causes for the injunction go to other matters than those stated in that article. New issues have been raised, in which the Beaulieus hold the affirmative. To these Furst has responded, and, in his answer, he asks for a judgment for his debt, in the nature of a reconventional demand. If Furst confines himself to his original petition, it is clear that he must fail, as it is shown beyond all doubt that the act is not one on which an order of seizure and sale can be issued. It is proved beyond all question that the act was signed in the parish of Jefferson, where the Beaulieus reside, and that the notary, who resides in New Orleans, was not present at all. The act purports to have been executed in the presence of three witnesses, and they signed it; but the evidence clearly establishes that two of them, Wolmar Bon and Quemper, were not present, and never saw the parties sign at all. The former testifies to the fact. Emmerlung, a witness named in the act as being present, says that no one was present

but himself and Le Carpentier. He signed it after he returned to the city. Le Carpentier says he saw it signed, but his name is not in the copy on which the order of seizure and sale was issued. The act is shown not to have been executed in the presence of a notary and two witnesses, and does not import a confession of judgment. No order of seizure can, therefore, be issued on it; and Furst's only chance to prevent being turned out of court, is to hold on to his answer to the petition for an injunction, in which proceeding he is the defendant. The idea that Furst continued to be the plaintiff after the injunction, seems not to have suggested itself until the argument before the jury. In his answer he styles himself the defendant, and the Beaulieus the plaintiffs. Throughout all the pleadings and trial, up to the argument, he and they are invariably so called; and we think he cannot at pleasure shake off his acknowledged capacity, and assume that of his adversary. The plaintiff's counsel in all cases, is entitled to the opening and closing argument; and being satisfied that the Beaulieus are such, we think the judge erred in permitting the counsel for Furst to open and conclude the argument to the jury. 5 Mart. N. S. 75.

The second bill of exceptions, is to the opinion of the judge refusing to permit Rillieux to relate all that the plaintiffs had said to him, at the time they told him "the property was seized, but did not explain how, or the circumstances," on the ground that, as the other party had called for a part of what was said, they had a right to know all that passed. We think the judge did not err. The principle of law asserted is correct; but so far as we are able to understand the objection, and what the witness stated, it does not appear that there was any other conversation relevant to this transaction.

The third bill is to the refusal of the judge to permit Favre Hazeur, the broker, to testify to all the facts of the case as they occurred. Furst objected, on the ground that he was the endorser of the note sued on, and interested in the case. We think the judge did not err; and the objection that it was too late after the witness was sworn in chief cannot avail the plaintiffs, as the record shows that the testimony of the witness was not intended in the first instance to apply to Furst.

The judgment of the District Court is, therefore, reversed, and

the cause remanded for a new trial, with directions to the District Judge to permit the counsel for the Beaulieus, the plaintiffs, to open and close the argument before the jury, and otherwise to proceed according to law; the appellee paying the costs of the appeal.

J. W. Smith, for the appellants.

L. C. Duncan, contra.

Succession of Antoine Carraby—Etienne Carraby, Appellant.

Where a stranger to a succession withholds the price of property purchased at a sale of its effects, an action for the amount can be brought only before a court of ordinary jurisdiction. *Aliter*, where a legatee and universal heir seeks to avail himself of the privilege allowed by art. 1265 of the Civil Code, of retaining the price of property so adjudicated until his share shall be fixed by a partition. The rights of a co-heir, who exercises this privilege, must be settled contradictorily with the other heirs, under the direction of the Court of Probates, whose decree must fix the portion coming to each. Until this be done, the heir who purchases keeps the purchase money as a kind of deposit, subject to the decision of the Court of Probates, which must determine what he is to pay over. The court which makes such a decree, must have authority to enforce obedience to it.

Before delivering the whole estate into the hands of an universal heir, the executor has a right to require, that a sufficient sum be placed in his hands to pay the particular legacies. C. C. 1664.

Appeal from the Court of Probates of New Orleans, *Bermudez*, J.

Morphy, J. The facts which led to this controversy, relate to the settlement of the estate of the late Antoine Carraby. In his last will, the deceased, after bequeathing one-fourth of the nett proceeds of all his property to his natural children, declares that all the particular legacies which he makes, to the amount of $62,000, are to be borne by, and paid out of the three remaining fourths of his succession. He institutes his brother, Etienne Carraby, the present appellant, his sole and universal heir, for any surplus of his property which may be left, after the payment of

all his just debts and the particular legacies. Among the latter was one of $15,000 to the said E. Carraby, and one of $10,000 to Arnaud Carraby, another brother of the deceased. This last amount, according to the will, is to be paid over to Etienne Carraby, to be by him laid out at interest, or invested in real estate, and the interest, or the rent, as the case may be, paid every month to Arnaud Carraby. The testator concludes by appointing Etienne Carraby his executor; and in case of death, absence, or inability to act from any other cause on the part of Carraby, he appoints in his place, his nephew, Philippe Guesnon. After administering for some time on the estate, Etienne Carraby resigned his trust, whereupon P. Guesnon qualified as executor, and proceeded to sell all the property belonging to the estate. At this sale, Etienne Carraby purchased property to the amount of $44,845, in payment of which he receipted to the executor for the $25,000 coming to him for his own particular legacy, and that of his brother, Arnaud Carraby. For the balance of the price, he gave endorsed notes, which he afterwards prevailed upon his nephew, Guesnon, to return to him before they became due. He appears to have received them back as money which might be coming to him as the universal heir of the deceased. Guesnon, throughout his administration, suffered Carraby to intermeddle with it by paying part of the debts and legacies, and by receiving funds belonging to the estate in his capacity of universal legatee. On the 20th of November, 1838, the executor, at the instance of Carraby, filed an account of his administration. From this account it appeared that, after paying the debts of the estate, the executor had made to himself and some of the legatees, partial payments, amounting to $17,896 63, and that the universal legatee, E. Carraby, had received or retained on the purchases made by him, $32,273 29, besides the $25,000 receipted for as particular legacies. It further appeared, that an amount of $12,454, in notes, had been returned by the executor as uncollected and of no value. This account was opposed by several of the legatees, and by the curator of John Gravier's estate. The former, after objecting to several items of the account, opposed its homologation mainly on the ground, that the executor had no right to pay certain legatees in preference to others, and that, as the estate appeared insuffi-

cient to pay them all, he should not have paid over the funds in his hands to Carraby, or compensated with him for the property he had bought of the estate. The curator of J. Gravier's succession urged that he had a claim of $60,000 against the testator's estate, and had obtained thereon a judgment for upwards of $20,000. That an appeal had been taken by the executor, in which he, the curator, had joined, praying that the judgment might be amended so as to allow him the whole amount of the claim. That the payments alleged to have been made were unauthorized, and that no legacies should be paid until his claim be finally settled and satisfied. To these several oppositions, the executor answered, averring, among other things, that, with the exception of certain payments by him made to some of the creditors and legatees, he has handed and paid over to the universal legatee, all the sums he received or collected on behalf of the estate, and that the said E. Carraby is answerable for the same, and is bound to refund said sums, as also the amount by him kept and retained on the price of the property he purchased, to enable him, the executor, to deposit the same in court, subject to a final decision on the several oppositions filed. The executor prays, in conclusion, that E. Carraby, and the several legatees by him paid, may be made parties to the proceedings, and be decreed to refund such sums as may be found to have been improperly received or retained by them. In answer to the executor's call in warranty, and to the several oppositions by the legatees, E. Carraby averred that, as universal heir of the deceased, he is entitled to a delivery of the estate, after payment of the debts and particular legacies. That he is by law authorized to retain in his hands the price of the property he bought, till the final settlement of the succession, being the universal heir to whom the executor has finally to account, and being, moreover, entitled to two legacies, amounting together to $25,000. That in relation to the $32,273 29, for which he is said to be accountable, he has actually paid, to the discharge of the succession, the sum of $9,402 10, thus reducing the balance in his hands to $22,871 19, which he has a right to keep until a final settlement of the estate, which can take place only after a final decision in the suits pending in the Supreme Court. He prays, after other averments, that the executor be or-

dered to deliver to him as universal legatee, the whole succession, including the sums prematurely paid to the legatees, reserving to the latter their right of claiming of him, E. Carraby, their respective legacies, when the decision of the suit pending against the estate shall have shown its real amount.

Under these pleadings, which have been stated only so far as was necessary to a proper understanding of the case, the parties went to trial. After passing upon the contested items of the account, the judge below ordered the several legatees, who had received any portion of their legacies, to refund the same; and condemned the universal legatee, E. Carraby, to pay to the executor, the whole amount by him received or retained, to enable the latter to liquidate and settle the estate.

Before touching the merits of this case, which can be considered only as regards E. Carraby, who alone has appealed, an exception taken to the jurisdiction of the Court of Probates must be disposed of. It is said that as the want of jurisdiction is *ratione materiæ*, and the court is one of limited powers, no consent or act of Carraby can give it jurisdiction. We cannot admit that, in a case like the present, the Court of Probates is without jurisdiction *ratione materiæ*. If the appellant were a stranger to the succession, withholding the price of property purchased by him, he would be suable therefor only in the ordinary courts; but here, in his capacity of legatee and universal heir, he seeks to avail himself of the privilege acceded to co-heirs by article 1265 of the Civil Code, of retaining the price of succession property adjudicated to them, until their share has been definitively fixed by a partition. The rights of a co-heir who exercises this privilege are to be settled contradictorily with the other heirs, under the control of the Court of Probates, whose decree must fix the portion coming to each heir. Until this be done, the co-heir who purchases keeps the purchase money as a kind of deposit, in his hands, subject to the ulterior decision of the Court of Probates, which must determine what portion of it belongs to him as a co-heir, and what portion he is bound to pay over. The court, which has made such a decree, must have jurisdiction to compel obedience to it. The record shows, moreover, that large sums of money have been received by E. Carraby, in his capacity of uni-

versal heir; and, as such, he claims not only the right of retaining them, but also prays for a delivery of the whole estate into his hands. Before complying with this demand, the executor has surely the right of requiring that a sufficient sum be placed in his hands to pay the particular legacies. Civ. Code, art. 1664. Of these matters and issues, the Court of Probates is certainly not without jurisdiction, *ratione materiæ*.

Since the rendition of the judgment below, both Guesnon and Carraby have failed, and the dative testamentary executor, appointed in lieu of the former, and the syndics of the creditors of the latter, have been made parties to this appeal. A more material change has also taken place in the state of the facts, upon which the judge below had to pronounce, which is that the only outstanding claim against the deceased, to wit, that of the estate of John Gravier, no longer exists. This fact has been asserted at the bar and not denied. It is moreover within our own knowledge, as it results from a decision of this court in the case of *Gravier's Curator* v. *Carraby's Executor*. 17 La. 118. By reason of this circumstance, which limits the distribution of the funds of the estate among the heirs and legatees under the will, we have been earnestly requested to determine at once the sum which the appellant is bound to pay back to the executor, and to amend the judgment accordingly, instead of remanding the case for adjustment below. It has been suggested that, under the peculiar situation of the parties, and in consequence of the judgment of the Probate Court having become final, as to all of them, except Carraby, who alone has appealed, a reversal of the judgment as to him might frustrate the ends of justice, by depriving the appellee of the judicial mortgage on his estate, when it is manifest that he owes and is bound to refund a large portion of the sum he has been decreed to pay. The record enables us to comply with the request of the appellee's counsel, and we deem it our duty, under the circumstances of this case, to do so. Code of Pract. art. 905.

It is clear that the appellant should not be compelled to pay over to the executor all the sums by him received or retained, and then await a settlement of the estate to receive back the portion

which may be coming to him. Independent of article 1265 of the Civil Code which he invokes, we have uniformly held, that no one should be made to pay the whole amount of a sum which, when paid, he will be entitled to receive back in whole or in part. 8 La. 301. 1 Robinson, 535. In order to determine the amount to be paid by the universal legatee out of the sums he detains, we must ascertain the situation of the estate in relation to the legacies to be paid under the will. From the record, it is as follows, to wit:

Amount of the estate as per executor's account,	$97,033 58
Notes returned as of no value,	12,454 00
	$84,579 58
The debts paid amount to	9,409 55
Leaving, for nett proceeds,	$75,170 03
Of which one-quarter, under the will, goes to the natural children of the deceased,	18,792 50
Thus leaving for the remaining three-quarters,	$56,377 53

This sum, being insufficient to pay the particular legacies, the universal legatee can only retain on his particular legacy of $25,000, such proportion of it as would be coming to him, on a *pro rata* distribution of the remaining three-quarters of the estate among all the legatees.

The proportion would be	$22,732 87
He is, moreover, entitled to retain, for so much paid by him to the legatees out of funds in his hands,	6,902 10
Making the amount to be retained,	$29,634 97
The record shows that, deducting the debts of the succession proved to have been paid by him, Carraby yet detains a sum of	$57,273 10
From which deducting the amount he is authorized to retain,	29,634 97
He has to refund	27,638 13

If to this sum be added the aggregate amount of legacies paid by both Carraby and Guesnon, to wit,		24,798 73
We find		$52,436 86
A sum sufficient to pay the natural children their one-quarter,	$18,792 50	
And the *pro rata* amount of the other particular legacies, to wit,	33,644 36	52,436 86

Thus showing that $27,638 13 is the amount which the appellant has to reimburse the executor, to enable the latter to settle and liquidate the succession.

It is therefore ordered, that the judgment of the Court of Probates be so amended, that the executor of the estate of the late Antoine Carraby recover of the syndics of Etienne Carraby's creditors, only a sum of $27,638 13, instead of $62,303 49, which he is decreed to pay by the judgment appealed from. The costs of this appeal to be borne by the appellee.

Roselius, for the appellant.

Hoa, contra.

The State *v.* The Judge of the Court of Probates of St. Tammany.

A second *fi. fa.* cannot be issued on a judgment, until the first is returned.

Application for a mandamus to the Judge of the Court of Probates of St. Tammany, *Briggs*, J.

A. Hennen, for the applicant.

Penn, contra.

Simon, J. An application for a mandamus to the Judge of the Court of Probates of the parish of St. Tammany, has been made by Brumfield, with a view to compel him to issue an execution, to enforce the payment of a judgment heretofore obtained by Brumfield against Ann Mortee, as administratrix of Peter Mortee's estate.

The judge, in his answer, states, that on the 5th of November, 1841, he issued an *alias fi. fa.* in the above suit, upon the written order of the plaintiff's counsel. That said execution was enjoined by Thomas J. Mortee, syndic of Ann Mortee, by order of the Court of Probates of the parish of St. Tammany, on the 6th of December, 1841. That the injunction has never been definitively disposed of, being now pending before the said Court of Probates.

It does not appear that the execution alluded to by the judge in his answer, was ever returned by the sheriff, and we must presume that it is yet in his hands, as being only suspended by the injunction. Code of Prac. art. 700. In such a case, it is clear that two executions cannot issue at the same time on one judgment, or issue and be placed in the hands of the sheriff to be acted upon successively (2 La. 66); and that a second writ of *fi. fa.* cannot be issued until the first is returned. 3 Mart. N. S. 391.

But even supposing the first execution to have been returned after being stayed by the injunction, this circumstance would not in any manner assist the applicant. The effect of the injunction is to prohibit, or rather to suspend the seizure and sale of the defendant's property, until otherwise decided by the court. If the seizure has already been made or levied, the sheriff cannot proceed to the sale of the property. He must wait until the injunction is disposed of. In this case, what would be the use of ordering a new execution to issue, if, when put into the hands of the sheriff, it cannot be acted upon? It seems to us that the present application has for its object a direct violation of the injunction; and we are not prepared to say that it should not be respected, however injurious it may be to the party enjoined.

Rule discharged.

Alexander Hivert v. Elizabeth Rose Jean Pierre Firmin Lacaze.

Proof of an offer by the vendor to annul the sale of a slave, on the payment of a certain sum, will exonerate the plaintiff, in a redhibitory action, from the necessity of proving a tender of the slave. The tender would have been useless, without the payment of the sum demanded.

Where the record does not show whether a slave sold was delivered to the vendee at the time of the adjudication, or after the execution of the notarial act, it will be presumed that the vendor retained possession until the act of sale was passed. C. C. 2588.

Concealment by the vendor of a slave, of the fact that the intellect of the slave was not sound, is a fraud upon the purchaser, and will annul the sale. And so, though the sale were made, in the absence of the owner, by an agent aware of the defect.

Where the defendant, in a redhibitory action for the price of a slave, pleads a general denial, and specially denies that he was aware of the alleged unsoundness, he cannot set up in his defence that the alleged defect was one which the buyer might have discovered by simple inspection. Such an exception should have been pleaded, specially, to put the plaintiff on his guard, and afford him an opportunity of disproving the fact.

One who relies on a peremptory exception, founded in law, must plead it specially.

Appeal from the District Court of the First District, *Buchanan*, J.

Bodin, for the plaintiff, cited the case of *Rouzel* v. *McFarland*, 8 Mart. 704.

J. F. Pepin, for the appellant. The plaintiff cannot recover. The defect alleged to have existed, is one that must have been discovered by simple inspection, and is, consequently, not a redhibitory vice. Civ. Code, art. 2497. *Briant* v. *Marsh*, 19 La. 391. Moreover, no tender has been proved. *Barrett* v. *Bullard*, 19 La. 281.

Simon, J. This is a redhibitory action. The petition states that, on the 8th of August, 1838, the plaintiff purchased at public sale a certain slave named Betsey. That the sale was made at the request of the defendant, through his brother and agent, subject to be ratified by the defendant, who was then absent, within four months from the date of the sale. That the slave was fully guarantied against the vices and maladies prescribed by law, and that the price paid was four hundred and seventy dollars. The plaintiff further alleges, that on the very day the slave was delivered

to him, she showed the most decided proof of madness or idiocy. That the disease existed long previous to the sale, to the knowledge of the agent, who concealed the defect from the purchaser; and that the delivery of the slave was only made after the plaintiff had paid the price thereof. He prays that the sale may be cancelled, as having been made in fraud on the part of the vendor, and that the expenses incurred for keeping and taking care of the slave, to the amount of three hundred dollars, may be awarded to him, &c.

The defendant joined issue by first pleading a general denial of the allegations contained in the petition, admitting the sale made by his agent, but specially pleading that he never knew the slave to be mad. He further pleaded the want of amicable demand.

The inferior judge was of opinion that the action was well founded, and rendered judgment in favor of the plaintiff, allowing him also the reimbursement of the jail fees, and other charges for keeping and taking care of the slave during the pendency of the suit, without liquidating them; from which judgment, the defendant has appealed.

We agree with the judge *a quo*, that the offer, made by the defendant's agent to the plaintiff, to annul the sale if he would give one hundred dollars, as the person who had purchased the slave before the plaintiff bought her, had done, which fact is shown by the testimony of Romain Moret, is sufficient to exonerate the plaintiff from the necessity of tendering the slave, as the tender would have been useless, without paying the sum of $100. This offer is shown to have been made in a conversation which took place between the plaintiff and the defendant's brother and agent, in which the plaintiff complained that the slave was not such as she was guarantied to be, and desired Lacaze to annull the sale. This was refused, on the ground that the slave was sound; but accepted, provided $100 were paid.

On the merits, the evidence shows, that on the 8th of August, 1838, the plaintiff purchased at public auction a young negro-woman named Betsey, for the price of $470; and that, on the 9th, a notarial act of sale of the slave was executed. The record does not inform us whether the slave was delivered to the vendee at

the time of the adjudication, or after the passing of the notarial act; and we must, therefore, presume that the vendor retained the possession of the slave until the act was passed. Civ. Code, 2588. On the 12th and 13th, she was examined by two physicians, who recognized her as being the same slave that they examined on the 23d of June preceding, at the request of another individual, and declared that they were then, and are still, of opinion that she is, and for some time has been in a condition of mental imbecility. One of them states in his certificate, that the state of imbecility in which he saw the slave *a month previous*, has undergone no change—*n'a fait aucun progrès vers le mieux*. They also certify that she had a scar on her forehead, and that, struck with the strange expression of her countenance, (*habitude extérieure*,) and the incoherence of her answers, their attention was called to her intellectual faculties, from which examination they ascertained that she was, and is yet, totally unfit to perform any act which may require a combination of the simplest ideas.

We think the existence of the defect complained of, and the charge of fraud alleged in the petition, are sufficiently established by the evidence. It is clear that, at the time of the sale, the vendor himself, or his agent, knew that the slave's intellect was not sound, and that the defect would subsequently be discovered by the purchaser. It was his duty to declare it, and his concealing the malady with which he knew the slave to be afflicted, was a fraud practiced upon the plaintiff, which, of itself, is a radical vice in the contract, sufficient to annul it. This vendor had already benefited once from a similar act of fraud, having sold the slave to another person some time previous, and consented to take her back, on being paid one hundred dollars by the purchaser. The sale under consideration, tainted with this nullity, must, therefore, be cancelled, although executed in the absence of the owner of the slave. *Qui facit per alium, facit per se.*

It has been insisted, however, that the defect complained of was an apparent one, and such as might have been discovered by simple inspection (Civ. Code, art. 2497); and we have been referred to the case of *Briant* v. *Marsh*, 19 La. 39.

Were we ready to extend the doctrine therein recognized to the present case, and to give to article 2497 of our Code, the

same broad interpretation, under a state of facts and circumstances so entirely different from those presented in the case above referred to, we still think the defendant would be precluded by his pleadings from claiming the application of that article. By his answer, he merely denies generally the allegations contained in the petition, and specially his alleged knowledge of the defect. This only puts in issue the existence of the malady, and the charge of fraud, relied on by the plaintiff; and if the defendant had really intended to establish his defence on the peremptory exception pointed out by article 2497, it was his duty to plead it, in order to put the plaintiff on his guard, and afford him an opportunity of producing evidence to counteract the effect of the exception. As the pleadings stood, the plaintiff may have thought it unnecessary to prove any other facts but those required in support of his action. It is a well known rule, that he who relies on a peremptory exception founded on law, must plead it specially (Code of Pract., arts. 345, 346); and the defendant having failed to do so, this part of his means of defence, if at all available, must be disregarded.

With regard to the expenses alleged to have been incurred by the sale, and by the keeping and taking care of the slave during the pendency of this suit, and other damages, we concur in opinion with the judge *a quo*, that, the seller knowing the defect of the slave sold, and having omitted to declare it, they ought to be allowed. Civ. Code, art. 2523. But as the amount thereof is not, and could not, perhaps, be finally liquidated by the judgment appealed from, owing to the continuation of the controversy, and to the pendency of the suit before the appellate court, we think this is properly a subject of subsequent investigation, as being a consequence of the cancelling of the sale; and that, under the particular circumstances of this case, justice requires it should be remanded, for the purpose of assessing the amount to which the plaintiff may be entitled.

It is, therefore, ordered, that the judgment of the District Court be affirmed with costs; and that this case be remanded to the lower court, for the purpose only of assessing the amount of expenses and damages due to the plaintiff, according to the legal principles recognized in the above decision.

Matthew Shaw *v.* Samuel W. Oakey and others.

Where a person in New Orleans orders, by letter, goods to be shipped to him from New York, offering to pay for them at a certain period after shipment, the contract will be governed by the laws of the latter place, where the final assent necessary to the completion of the contract was given, and the order received and executed.

An account bears interest from its liquidation; and will be considered as liquidated from the time when it was rendered, if not objected to within a reasonable period.

Where in a sale of goods, a time for payment is fixed, an agreement to pay interest may be implied.

An unliquidated account bears interest from judicial demand.

A payment cannot be imputed to the reduction of the principal, where any interest is due. C. C. 2160.

Appeal from the Commercial Court of New Orleans, *Watts*, J. *Emerson*, for the plaintiff.

T. Slidell, for the appellants. The contract should be governed by the laws of this State, and the interest, if allowed, should be five per cent. Story, Conflict of Laws, 247. *Fanning and others* v. *Consequa*, 17 Johnson, 510.

Morphy, J. This action is brought on two invoices of goods, shipped in New York to the defendants, who reside in this city. When the latter requested the plaintiff to forward the goods, it was stipulated that they should pay for them six months after the shipment should have been made in New York. Some partial payments having been shown on the trial, judgment was given below for the balance due on the amount of the two invoices, together with interest thereon at the rate of seven per cent per annum from the expiration of the credit agreed on. The defendants have appealed.

The only point made in this case is, that no interest should be allowed, the claim being on an unliquidated account; and that if allowed, it should not exceed five per cent per annum. Even were this contract to be regulated by the laws of Louisiana, as the appellants contend, the plaintiff would be entitled to interest from judicial demand; but we are of opinion that the laws of New York are to govern, because the final assent necessary to the formation of the contract was given by the plaintiff in New York, where he received and executed the defendants' order for the goods.

Story's Conflict of Laws, § 285. *Whiston et al.* v. *Stodder et al., Syndics*, 8 Mart. 133. In that State it has uniformly been held that after an account has been liquidated, it carries interest, and that an account is to be considered as liquidated after it has been rendered, if objections are not made to it. 15 Johnson, 424. It appears reasonable enough to presume the acquiesence of the debtor in an account rendered to him, if, during a reasonable time for that purpose, he does not object to its correctness. It also seems, that where in a sale of goods, a time for payment is fixed, an agreement to pay interest may be implied. 6 Cow. 193. 2 Wendell, 501. In their letters to the plaintiff, shortly after the arrival of the goods, the defendants acknowledged they had received them, with the two invoices sued on, without either then or since making any objection to the account thus rendered to them. They, moreover, fixed themselves the time of payment, at six months from the delivery of the goods on board of the ship at New York, and the time of such shipment is shown by the bill of lading. They, therefore, owe interest from the expiration of the credit given, at the rate of seven per cent per annum, which is the interest allowed in that State. Revised Statutes of N. Y. vol. 1, p. 760, 2d ed. As to the mode of computing the interest, the judge appears to have calculated interest on the principal up to the time when a payment was made, and to have added this interest to the principal and then deducted the amount paid. This appears to us to be correct, where the payments exceed the interest due. *Williams and others* v. *Houghtaling and others*, 3 Cowen, 87, note (*a*). Civ. Code, art. 2160. It was also the principle of the Roman law. *Prius in usuris, reliquum in sortem.* De Fid. et de Mand. l. 68.

Judgment affirmed.

David Reeves and others *v.* Nathan F. Comly.

The subsequent return of a party, whose property had been attached on an affidavit that he had left the State with the intention of never returning, will not alone be sufficient ground for dissolving the writ, where circumstances render it probable that his original intention was not to return. The intention of returning should have been clearly proved, to entitle the defendant to a dissolution of the attachment.

Appeal from the District Court of the First District, *Buchanan*, J. A rule was taken on the plaintiffs, to show cause why an attachment, which had been issued in this case on an affidavit that the defendant "had absconded from the State with the intention of never returning," should not be set aside, on the ground that the affidavit was false. The record of the case of *The New Orleans Canal and Banking Company* v. *Comly*, (1 Robinson, 231,) was the only evidence introduced on the trial of the rule. The rule having been made absolute, the plaintiffs appealed.

R. M. Carter, for the appellants.

Durant, for the defendant.

Martin, J The plaintiffs are appellants from a judgment sustaining the opposition of the defendant to a writ of attachment obtained by the former, on the disproval of the fact alleged, to wit, that the defendant had left the State with the intention not to return. The facts of this case are exactly the same as those in a case against the same defendant, decided in this court in January last. 1 Robinson, 231.

The first judge determined the question of law in accordance with our judgment in the former case, but he viewed the question of fact in quite a different light.

The defendant gave his actual return as evidence of his intention to return, and the court was of opinion that the record presented no fact which authorized a conclusion different from that to which it arrived. In this, in our opinion, the judge erred. The record of the case determined by us in January last, taken from the minutes of the District Court, from which the appeal was brought up, was placed before him. On the facts proved in the District Court, we said, that "the case of the defendant is that of a person charged with having, with the aid of one of the tellers

of the Bank, actually defrauded it of a sum of upwards of sixty thousand dollars, a circumstance which, in our opinion, removes every suspicion of an intended deviation from the truth in the President of the Bank, who made the affidavit required by law. Notwithstanding this, if the defendant had made his intention to return evident, he would be entitled to relief; but the consequences he had to apprehend from the gross fraud he is charged with having committed on the Bank, rendered his intention to avoid them by flight so probable, that the mere circumstance of his return does not totally destroy the presumption. Men often do that which they once intended not to do."

It is therefore ordered, that the judgment be reversed, and the attachment reinstated; the defendant and appellee paying the costs of the appeal.

ANTOINE JONAU *v.* LOUIS FERRAND.

A balance due on an unliquidated account, cannot be pleaded in compensation in an action on a due bill or *bon*; nor in reconvention, when unconnected with the plaintiff's claim.

Pleas in reconvention must be set forth with the same certainty as to amounts, dates, &c., as if the party opposing them were plaintiff in a direct action.

Instead of striking out any portion of the pleadings, a more regular course is to permit the parties to go to trial, and to reject, on the objection of the opposite party, any evidence offered to sustain such portion.

Evidence, when required to be reduced to writing, must be taken down by the clerk, and should, in all cases, be read to the witness before he leaves the stand. The judge has no right, under any circumstances, to add to, or take from it, without recalling the witness.

A broker, examined as a witness to prove the market value of certain stocks, will not be compelled to disclose the names of persons to whom he has sold shares of the same stock, where there is no intimation of any intention to examine such purchasers for the purpose of contradicting him, their names being, under such circumstances, immaterial.

APPEAL from the City Court of New Orleans, *Cooley*, J.

This case was submitted, without argument, by *L. Janin*, for the plaintiff, and *Schmidt*, for the appellant.

Garland, J. The defendant resisted a claim made upon his due bill or *bon*, for money acknowledged to have been received, by a plea in compensation and a demand in reconvention, on an allegation of long standing and unsettled accounts. These pleas were, on the motion of the plaintiff's counsel, stricken out, on which the defendant pleaded payment. There was a judgment against him, and he has appealed.

In this court the defendant's counsel complains that his original pleas were erroneously stricken out. In two cases, between the same parties, which were determined in May last, the same points were raised; and we were of opinion that the pleas of the defendant could not be sustained, because the sums pleaded in compensation were entirely unliquidated. Neither could the demand in reconvention be sustained, because the defendant's allegations were too general, and did not show that the matters upon which his claims were based, had any connection with the demand of the plaintiff. We then referred to the case of *White* v. *Moreno*, 17 La. 372, in which we held, that "pleas in reconvention should be set forth with the same certainty as to amounts, dates, &c., as if the party opposing them were himself plaintiff in a direct action." We are of opinion that the judge did not err, in *striking out* those pleas, as it is called; though the most legal and regular course would, perhaps, have been, to permit the parties to go to trial, and to have then rejected, on the objection of the plaintiff, any evidence the defendant might have offered. The *striking out* of a plea, which still remains in the record, and cannot be withdrawn without the consent of both parties, means, we suppose, that the judge intends to disregard it on the trial; and as, in this case, it gave the defendant an opportunity to avail himself of another ground of defence, no injury has been sustained by him, since the judge would have been right in rejecting any evidence he might have offered, in support of the plea in compensation and the demand in reconvention.

The first bill of exceptions in the series which the record exhibits, is to the opinion of the judge ordering an addition to be made to the testimony of a witness, which had been taken down by the clerk, after the witness had retired. This he did on motion of the plaintiff's counsel, although opposed by the defendant,

who insisted that it could not be done without recalling the witness. The addition was as follows: "Witness says he knows nothing more of what is contained in defendant's affidavit. Cross-examined—Says that the par value of the stock is $50." The judge, in the bill of exceptions, states that he permitted the correction to be made, as he had a perfect recollection that the witness stated what was inserted, and the clerk had omitted to take it down. We have not the shadow of a doubt but this is true. The high character of the judge forbids the suspicion of an improper motive, and none is imputed by the counsel; but we are of opinion that the judge erred. The law requires the evidence to be taken down by the clerk, when required by the parties. Great care should be taken to get it correctly stated, and in all cases it should be read to the witness, before he leaves the stand; and a judge has no right to add to, or take from it any thing, without recalling the witness, although his recollection may be clear that the witness stated what he adds. To do otherwise would be recording the recollections of the judge of the statement of the witness, and not the statement itself.

In the present case, the words added were very material. We have, therefore, noticed this bill particularly, with the view of establishing an inviolable rule, in regard to taking down testimony; but in coming to a decision upon this case, have entirely excluded those words from our consideration, so that the defendant suffers no injury as his cause was not tried by a jury.

The second bill is to the refusal of the judge to compel a broker, who was examined in order to fix the market value of certain stocks, to disclose the names of the different persons to whom he had sold such stocks. The broker objected to answering, stating that he considered his transactions with other individuals as confidential and appertaining to themselves, but that if the court said he must answer, he would do so. The judge refused to compel the witness to disclose the names of the different purchasers, as there was no intimation of any intention to call on them to testify in contradiction to the broker, and the names were therefore immaterial. We think the judge decided correctly.

The third bill we consider as raising no question material in the case. The fourth relates to striking out the plea in compensation

and demand in reconvention, which has been settled by the decisions previously referred to. The fifth and last has also been decided, as it relates to the refusal of the judge to have witnesses attached, to prove the demands in reconvention and the plea in compensation.

Previous to the trial, the defendant made an affidavit, for the purpose of having his witnesses attached. In it, he stated what he expected to prove by them; and the plaintiff admitted, that if the witnesses were present, they would swear to what the defendant stated, reserving his objections to the admissibility of the evidence, and his right to show all the facts. This affidavit the defendant offered as evidence on the trial. He states that he had, at different times, transferred to the plaintiff twelve shares of City Bank stock for $600, and ten shares of Exchange Bank stock for $500, which he accepted for $1100, the plaintiff assuming to pay the amount of certain notes owing for the stock, or secured upon it; and, further, that the stock was worth at least $950, and *would pay* the present demand. There is no direct allegation that the stocks were accepted in payment, but an inference to that effect is attempted to be drawn.

The evidence really given on the trial shows, that Ferrand purchased the City Bank stock on a credit, and had not paid for it. That he gave his note to secure the price, which was endorsed by Jonau, to whom the stock was transferred some time after, to secure him as such endorser. It is shown that the note has not yet been paid; and further, that Ferrand had borrowed $600 of the City Bank on a pledge of the stock, previous to the transfer. The amount of the note endorsed by Jonau, is not shown; but, from the statement of the witness Bergerot, it is at least $400. He says, that was considered an available balance on it, and that Ferrand told him the stock would secure Jonau on his endorsement to that amount. It is proved that the City Bank stock was worth about $80 per share; so those twelve shares may be considered as absorbed by the two notes.

The Exchange Bank stock, the defendant states in his affidavit, was accepted at $500; and the plaintiff admits that the witnesses will swear to it; and he must abide by the consequences, unless he can explain or disprove it in such a manner as to avoid

the effect of the admission. This he attempts to do, by showing that only $50 per share was paid on the stock, and that it was worth but $15 in the market. But he does not show that he took it at the market price. He further relies on that portion of the defendant's answer which was stricken out, in which he says that the Exchange Bank stock was transferred to the plaintiff, to secure him for any liabilities he might then, or at any future period, be under, on account of endorsements as well as of moneys lent, or otherwise; and on this the judge also relies in his judgment. Allowing the plaintiff the benefit of all this, he fails to sustain his case, as he does not show that he is under any other liabilities for the defendant, other than those secured by the City Bank stock, or that he has lent him any money other than the sum claimed. We think the effect of the plaintiff's admission has not been avoided, and that he must consequently give credit for the $500.

The judgment of the City Court is, therefore, reversed, and it is ordered and decreed, that the plaintiff recover of the defendant, the sum of four hundred and fifty dollars, with interest at five per cent from judicial demand, to wit, the 28th of August, 1841, until paid, and the costs in the inferior court, those of this court to be paid by the plaintiff.

The Second Municipality of New Orleans v. James H. Caldwell and another.

Sect. 4 of the act of 14th March, 1816, which provides that "neither the Mayor, Recorder, nor any Alderman then in office, shall be allowed, in his own name, or through the medium of others, to become a lessee or bidder for any branch of the revenues of the city, nor for any work or undertaking whatever which may be authorized or ordered by the corporation of the city of New Orleans," cannot be considered as prohibiting such persons from leasing any lot of ground or other property, not forming an entire branch of the revenue of the city.

Appeal from a judgment of the Commercial Court, *Watts*, J.

Rawle, for the plaintiffs.

Carter, for the appellant.

Simon, J. James H. Caldwell is appellant from a judgment

which condemns him and his co-defendant to pay the amount of several promissory notes. Their answer avers that the notes sued on were given for the lease of certain lots adjudicated to them; that the adjudication is a nullity; and that they have acquired no title by the adjudication to the leased property.

The record contains the following admissions: 1st. That the notes sued upon were given for the lease of certain lots in the city of New Orleans, leased by the defendants from the plaintiffs. 2d. That at the time of the lease, the defendants were Aldermen of the Second Municipality. 3d. That the property was leased for a term of years, not yet expired.

Under the above admissions, it is contended that the contract of lease, in consideration of which the notes sued on were given, is absolutely void, as the defendants, who were Aldermen at the time the notes were executed, were incapacitated by law from entering into such contract with the plaintiffs; and in support of this position, we are referred to the fourth section of a law of the 14th of March, 1816, (Bullard & Curry's Dig. p. 102, § 35,) which says, that "in future, the Mayor, Recorder, nor any of the Aldermen then in office, shall be allowed, either in his own name, or through the medium of other persons, to become *the lessee or bidder for any branch of the revenues of the city*, nor for any work or undertaking whatever, which may be authorized, or ordered by the corporation of said city." The French text of the law is: "*ne pourra se rendre fermier, ou adjudicataire de la perception d'aucune branche des revenus de la ville.*"

We think the law relied on by the defendants does not cover the present case. It is true it incapacitates the Mayor, Recorder and Aldermen from becoming the lessees or bidders for any branch of the revenues of the city, but it seems to us that its terms cannot be so construed or extended, as to prohibit them from leasing any lot of ground or other property of the city. Although revenue may be derived from the leasing of such property, surely, it cannot be said that they become lessees of a whole branch of the revenue. We understand the expressions used in the law, which in the French text are very clear, to mean that a branch of the revenue, that is to say, the collection of any species of revenue, which, with the other branches, is to form the whole annual in-

come of the city, shall not be leased to the persons therein named. In the one case, it is the revenue itself which becomes the object of the contract of lease, whilst in this case, it is limited to certain property which produces revenue, but which is only a portion of a particular branch thereof. For example: it is well known that every year all the stalls of the market house are offered at auction in a lump, and are adjudicated to the highest bidder. This bidder becomes the lessee of a branch of the revenues of the city, to wit, the revenue derived from the market house. This lessee pays a certain amount of rent to the corporation, with a view to speculate upon this branch of the revenue, by selling or leasing at a certain profit, the use of every stall separately to the butchers and other retailers of provisions. The law relied on may have been passed for the purpose of preventing the Mayor, Recorder and Aldermen from speculating on the public revenue of the city, or from monopolizing any branch thereof, to the injury of the citizen; but, in our opinion, it never was intended to forbid them from taking the lease of a lot of ground, or of any other specific property of the city.

Judgment affirmed.

FRANÇOIS GERBER v. LOUIS MARZONI.

The jurisdiction of the Supreme Court is to be determined by the value of what is claimed in the petition, not by the amount allowed by the judgment.

Action for $90 paid to defendant, in error, as owner of a butcher's stall, and for $2000 damages for forcibly turning plaintiff out and retaining the possession of the stall. Plaintiff having obtained a rule on defendant to show cause why he should not be put in possession, it was made absolute, and defendant appealed. *Held*, that the court erred in ordering a part of the case to be tried on a rule, and leaving the remainder untried. A cause should not be tried on any other day than the one fixed by the court, when called in its turn. C. P. 463.

APPEAL from the District Court of the First District, *Buchanan*, J.

Grivot and *Castera*, for the plaintiff.

Preaux, for the appellant.

MARTIN, J. The plaintiff claims the sum of ninety dollars, erroneously paid to the defendant for the hire of a butcher's stall in the market of New Orleans, of which the latter pretended to be the owner; and the further sum of two thousand dollars, for damages alleged to have been sustained by him in consequence of having been violently driven from the stall, and forcibly kept out of it by the defendant. The plaintiff concludes with a prayer, that he be restored to the possession of the stall. Before any answer was filed, the plaintiff obtained a rule on the defendant to show cause why he should not deliver to the plaintiff, and put him in possession of the stall. The defendant afterwards filed his answer, averring that, by a contract between them, he ceded to the plaintiff the use and possession of a stall which he occupied, and that the plaintiff promised to pay him therefor the sum of twenty dollars, monthly, &c. The rule was made absolute, the court being of opinion that the contract, stated in the answer, was illegal and contrary to public policy. The defendant has appealed. The plaintiff prays for the dismissal of the appeal, on the ground of want of jurisdiction in this court; nothing in the record, showing that the matter in dispute in the rule, to wit, the use and possession of the stall, was worth more than three hundred dollars; and also on the ground, that the rule decides the principal matter in controversy, to wit, the plaintiff's right to the use and possession of the stall. Our jurisdiction is to be tested by the value of what is claimed in the petition, and not by what is allowed by the judgment. The value of what is claimed in the present case exceeds, by a great deal, the sum of three hundred dollars. Whatever may be the amount of a judgment given, either party has a right to an appeal. That of the defendant, therefore, cannot be dismissed. On the merits it appears to us improper to try a case by partial rules to show cause. The Code of Practice, art. 463, requires, "that the clerk shall set down the cause on the docket of the court, in order that it be called in its turn, and a day fixed for its trial." The trial is not, therefore, to take place on any other day than the one, fixed by the court *when it is called in its turn;* and there ought to be but one trial. The court, in our opinion, erred in ordering the trial of part of this case on a rule to show cause, before

it was called in its turn, and leaving the remainder of the case untried.

It is, therefore, ordered, that the judgment be reversed, the rule discharged, and the case remanded for further proceedings, according to law and the opinion above expressed; the plaintiff and appellee paying the costs of the appeal.

CASIMIR BEAUDOUIN v. VICTOR ROCHEBRUN.

APPEAL from the District Court of the First District, *Buchanan*, J.

MARTIN, J. The facts of this case, and the pleadings, are exactly the same as in that of *Gerber* v. *Marzoni*, just decided; except that, in the present case, the defendant took a bill of exceptions to the opinion of the court overruling his objection to the case being tried on a rule to show cause, especially as he had prayed for a jury, which had not been done in the former case. This last circumstance strengthens his claim to the reversal of the judgment, which would have been sufficiently strong without it.

It is, therefore, ordered, that the judgment be reversed, the rule discharged, and the case remanded for further proceedings according to law; the plaintiff and appellee paying the costs of the appeal.

Grivot and *Castera*, for the plaintiff.

Rousseau, for the appellant.

THE MECHANICS AND TRADERS BANK OF NEW ORLEANS *v.* ANDREW HODGE and another.

Plaintiffs having obtained a judgment against the defendants, seized, under a *fi. fa.*, all the rights, credits, money, and other property of defendants, in the hands or under the control, of the Receiver of Public Moneys at New Orleans. A draft from the Commissioner of the General Land Office on the Receiver, in favor of one of the defendants, was presented for payment after the seizure, which was not accepted, there not being, at the time, sufficient funds in the hands of the Receiver. The draft was subsequently given up by the holder, and the instructions to pay it revoked. On a rule on the Receiver, to show cause why he should not pay over the money in his hands belonging to defendant: *Held*, that the Receiver had no funds belonging to the defendant; that the money belonged to the United States, and until paid over remained under the control of the government; that the mere order to pay, did not, of itself, transfer to the defendant any money in the hands of the Receiver, but was, at most, only an acknowledgment of the debt.

A rule cannot be taken on an officer of the United States, in his official capacity, to show cause why he should not pay over money, seized in his hands under a *fi. fa.*, as the property of a third person. To condemn him to pay as an officer, would be to condemn the government, which cannot be done.

APPEAL from the District Court of the First District, *Buchanan*, J.

This case was submitted, without argument, by *L. Peirce*, for the appellants, and *I. W. Smith*, for the defendants.

MORPHY, J. The plaintiffs having obtained a judgment against A. Hodge, took out a *fi. fa.*, under which the sheriff seized, in the hands of A. S. Lewis, the Receiver of Public Moneys for the government of the United States in this place, all the goods and chattels, lands and tenements, rights, credits, &c., belonging to A. Hodge, which he might have in his possession or under his control, and especially the amount of a certain draft or bill of exchange drawn by the government of the United States on the said Receiver, in favor of A. Hodge. The sheriff's return concludes by stating, that from this seizure nothing came into his hands. A rule was sometime after taken by the plaintiffs on the Receiver, Lewis, to show cause why he should not pay over to the sheriff the moneys seized in his hands, belonging to A. Hodge, under their execution against him. The judge below having discharged the rule, after hearing the parties, the plaintiffs appealed.

The record shows that the seizure was made in the hands of the Receiver, on the 30th of July, 1842. That on the 22d of August following, a draft for $2858 27, was drawn by the government on the Receiver of the Public Moneys, in favor of one George May, as attorney for A. Hodge, but that when presented, that officer refused to accept it, not having sufficient funds in hand. It further appears that, on the 20th of September following, the draft having been given up by George May, was cancelled, and the instructions given to pay its amount, revoked by the General Land Office.

Under these facts, it is clear that nothing was ever seized under the execution of the plaintiffs. The Receiver had no funds in his hands belonging to A. Hodge, either at the time of the seizure, or since. Whatever moneys he had in his possession as Receiver, always belonged to the United States. The draft subsequently drawn, was never accepted. So long as its amount was not paid over, it remained under the control of the government, which could revoke previous instructions to its agent in relation to it. The mere order to pay A. Hodge a certain sum, did not, of itself, transfer to him any moneys in the hands of the Receiver to an equal amount. It was, at most, an acknowledgment of his claim on the United States. But leaving out of view the facts of the case, it is not easy to perceive how the rule taken in this case could, under any circumstances, be entertained against A. S. Lewis, in his official capacity; for, being only an agent of the government, to condemn him to pay, as Receiver, would be condemning the government itself, which was not amenable to the court below.

Judgment affirmed.

HENRY A. NORCROSS and another *v.* GASPARD THEURER.

A credit which appears to have been endorsed on a note while in the possession of the payees, will be binding on them, unless they show it to have been made through error.

APPEAL from the Commercial Court of New Orleans, *Watts*, J.

MORPHY, J. This appeal has been taken from a judgment rendered on a promissory note for $407 73. The error complained of is, that the judge below allowed the full amount of the note, when on the back of it a credit of $100 is endorsed, reducing plaintiffs' claim to $307 73. As such an endorsement exists, and appears to have been made while the note was in the possession of the petitioners, who were the payees, they must, we think, be bound by it, unless they show, which has not been done, that it was made through error. Civ. Code, art. 2246. 2 Pothier, Oblig., No. 726.

It is, therefore, ordered, that the judgment of the Commercial Court be so amended, that the plaintiffs recover from the defendant only three hundred and seven dollars and seventy-three cents, with five per cent interest thereon, from the 14th of April, 1842, until paid, and two and a half dollars costs of protest, together with costs below, those of this court to be borne by the appellees.

Benjamin, for the plaintiffs. *Hiestand*, for the appellant.

ABRAHAM F. RIGHTOR *v.* JOHN SLIDELL.

Where, in an action against the maker of a note, in whose hands different creditors of plaintiff have seized all sums due by him to the latter, defendant denies that he is indebted to the plaintiff, he will not be exempted from the payment of interest, on the ground of his uncertainty as to whom he should pay. Having denied that he was at all indebted, he cannot allege that he was prevented from paying by any uncertainty as to whom he should pay.

Where different seizures have been made in the hands of defendant, of whatever sums may be due by him to plaintiff, on a judgment in favor of the latter, execution will be stayed until the seizures are proved to have been satisfied or abandoned. No law authorizes a judgment ordering the amount to be deposited in court, subject to the claims of the seizing creditors.

APPEAL from the District Court of the First District, *Buchanan*, J.

Larue, for the plaintiff.

T. Slidell, for the appellant.

MORPHY, J. The defendant is sued on a note of $3587 85¼, drawn to the order of the plaintiff. He admits his signature, but avers that the plaintiff cannot maintain this action, because the amount of the note in suit, and all sums by him owing to the plaintiff, have been seized in his hands by the creditors of the latter, under writs of *fieri facias* issued from the United States Circuit Court, and from several of the State courts. He further pleads in compensation and reconvention, the amount of two notes of $2666 66⅔ each, on which he alleges that the plaintiff has become liable to him, as endorser, and prays for judgment for the balance in his favor. To this demand in reconvention, the plaintiff, Abraham F. Rightor, answered, by denying defendant's right or title to the notes set up as an offset, and averring that if he has any title, he acquired it after the notes had been extinguished by compensation, in the hands of Charles F. Zimpel, to whom they formerly belonged, by three notes of the latter amounting to $10,771 56, on which he (plaintiff) obtained judgment against Zimpel on the 7th of April, 1840. Plaintiff further averred that he was ignorant that his demand against the defendant was seized by virtue of any execution, but, if such were the case, that he was perfectly willing the defendant should pay the amount due in satisfaction of any just debts of his. Judgment was rendered below, decreeing defendant to pay $3587 85¼, with legal interest from the day of protest; but ordering the money, when made on execution, to be deposited in court, subject to the claims of the seizing creditors. The defendant appealed.

The pleas of compensation and reconvention have not been much insisted on in this court, nor could they be pressed with any success. The evidence shows clearly that the two notes of $2666 66⅔ each, endorsed by the plaintiff, had been paid and extinguished by compensation, in the hands of Zimpel, long before they came into the possession of the defendant, who purchased them at a sheriff's sale as the property of Zimpel. It is contended that the judge below erred, in allowing interest on the amount

of the note seized in defendant's hands by different creditors, as defendant could not take upon himself to decide upon the validity or priority of these seizers, and as it was the business of the plaintiff to have these questions decided contradictorily among his own creditors; and we have been referred to the case of *Miles* v. *Oden et al.*, 8 Mart. N. S. 214, in which we held, that interest will not be allowed on a note given for the purchase of slaves, where there is a contest between two adverse parties about the proceeds, which places the maker in great uncertainty as to whom he has to pay, because the debtor, in such a case, cannot be considered *in mora*.* This argument, and the authority adduced in support of it, would perhaps be entitled to some weight, had the defendant admitted his liability to the plaintiff, and been prevented from paying only by some such uncertainty; but he has been contending throughout, that he is not indebted at all to the plaintiff. Until the defence set up by him in this suit was decided upon, no steps could be taken by the seizing creditors to compel him to pay, or to have their rights, under their seizures, adjusted. Had they made him a garnishee, and propounded interrogatories to him under the act of the 20th of March, 1839, he would not probably have acknowledged any indebtedness to the plaintiff, and no order of payment could have been obtained against him. B. & C.'s Dig. 458. Under such circumstances, the defendant must be considered *in mora*, and is bound to pay interest from the day of protest; but the money has, we think, been improperly decreed to be paid into court. We know of no law which authorizes the judge, in a case like the present, to make any such order.

It is, therefore, ordered, that the judgment of the District Court be affirmed, except that part of it which orders the money, when made on execution, to be deposited in court; and it is further ordered, that execution be stayed in this case until the plaintiff proves, to the satisfaction of the court below, that the several executions levied in defendants' hands have been satisfied or abandoned. The costs of this appeal to be borne by the plaintiff and appellee.

* The note sued on, did not bear interest on its face.

T. Slidell prayed for a re-hearing, as to so much of the judgment as condemns the defendant to pay interest. The sums claimed by the seizing creditors exceeded the amount of defendant's note, and the latter could not take upon himself the risk of deciding to whom payment should be made. How, then, can it be said that he was in default, and liable for interest, *ex mora*. Under such circumstances, interest is not due. See Sergeant on Attachment, 166. *Fitzgerald* v. *Caldwell*, 2 Dallas, 215. Interest, *ex mora*, is in the nature of damages for the non-performance of a contract to pay money. 12 La. 530.

As to the defendant's denial that he owed the debt, it is sufficient to say, that a party may plead various grounds of defence, if not inconsistent. In the case from Dallas, the defendant denied the debt; but having been garnisheed, was relieved from interest during the period of the garnishment.

Re-hearing refused.

ROWLAND G. HAZARD *v.* WILLIAM M. LAMBETH and others.

One acting as an agent, will not be liable, personally, to a party aware that he acts as such.

A party, who seeks to render another liable for the debt of a third person, must prove such liability beyond all doubt, or he cannot recover. C. C. 3008.

Mere voluntary payments, on some previous occasions, will not, of themselves, create an obligation to pay under future, though similar circumstances.

APPEAL from the Commercial Court of New Orleans, *Watts*, J.

MORPHY, J. The defendants have appealed from a judgment decreeing them to pay sundry drafts of the plaintiff on them, amounting to $6229 97. These drafts are founded on orders for negro clothing, which the petitioner, who is a manufacturer residing in Rhode Island, was in the practice of obtaining from a number of planters living on Red River, and in other parts of the State. The orders are all as follows, to wit: "You are requested to ship for me yearly, until otherwise ordered, the following goods, consigned to the care of W. M. Lambeth & Thompson, or successors,

New Orleans, who are hereby requested to authorize your draft on them for the amount, *for my account*, and, on receipt of bill of lading, or other evidence of shipment, to accept the same, payable 10th of January after. Winter clothing to be shipped by 1st of August, and summer clothing by 10th of March, each year." To these orders were appended lists of the articles required, consisting of negro clothing. From an inspection of these orders it is evident, that they were intended to be submitted for the approbation and acceptance of defendants. On the face of, and across, each order, the words "draft authorized as herein requested," are to be found; but for reasons which have not been explained, the signature of the defendants was never solicited by the plaintiff, who, it appears, was in the habit of furnishing them with duplicate copies of these orders. In pursuance of this arrangement, the goods ordered were annually sent from the north, consigned to W. M. Lambeth & Thompson, or Lambeth, Thompson & Co., to whom the plaintiff forwarded the bills of lading, enclosed in letters of advice of the following tenor, to wit:

"I hand you bill of lading for one bale, for account of J. Chambers, Esq., in conformity to whose instructions I draw on you for the amount, $342 09, payable 10th of January next. Invoice is forwarded to Mr. C. by mail.

"Yours respectfully,

"R. G. Hazard."

On the arrival of the goods, the defendants were in the habit of forwarding them to the planters whose business they did; and, with a few exceptions, they accepted or paid the drafts drawn on them under these orders. The goods in relation to which the difficulty arose, were shipped in June or July, 1841, received here in August, and immediately forwarded to those who ordered them respectively, but the defendants declined accepting or paying the drafts drawn on them by the plaintiff; whereupon the present suit was brought.

The inferior judge was of opinion that by receiving and forwarding the goods, when they knew that under the orders they were to accept the drafts, the defendants made themselves liable to the plaintiff as fully as if they had actually accepted them.

From the terms of these orders and the evidence, it appears to

us that, even had the defendants assented to the agreement between the plaintiff and the planters, and accepted the drafts sued on, they would have incurred no personal responsibility, so long as the drafts thus accepted did not pass into the hands of third persons. The defendants, who were, in New Orleans, the commission merchants of the planters with whom the plaintiff was treating in different parts of the country, were requested to authorize his drafts on them, and, therefore, to accept them *for the account* of those who gave the orders, on the receipt of the bill of lading or other evidence of shipment. The understanding seems to have been that the defendants should be a channel of communication between him and them, to receive and forward the goods, and accept his drafts for them; and that, through the defendants, the purchasers should pay such drafts by placing funds in their hands on the 10th of January. Had plaintiff considered the obligation of Lambeth & Thompson in a different light, it is difficult to suppose that he would have neglected to secure their personal liability, by getting them to sign the authorization to draw, written on the face of the orders. He was contented with furnishing them with duplicates of the orders, as a guide for the course they were to pursue. We, accordingly, find plaintiff forwarding directly to the planters invoices of the goods shipped, and sometimes reminding them that he would draw on their factors for the amount, payable on the 10th of January following. In a letter addressed to Chambers, one of those who gave the orders for goods, he says: "Messrs. Lambeth & Thompson decline accepting my bills for your account, waiting advice from you on the subject. The number of bills similarly situated is a very serious inconvenience to me, and I must, therefore, solicit your attention to it with as little delay as practicable. I annex a draft for the amount, payable at the time specified in the order, and will be much obliged by your signing and returning it to me, to the care of S. Robert, New Orleans.

"This will probably be the most satisfactory mode to your agents here, and at the same time produce least delay, which, I assure you, is, at this time, very important to me.

"Yours truly,

"R. G. Hazard."

In this letter, written from New Orleans, and bearing date the

24th of December, 1841, long after the goods of Chambers had been forwarded to him, the plaintiff makes no complaint against the defendants for refusing his drafts, nor does he intimate that they are personally liable to him in any way. After the 10th of January following, plaintiff called upon Audrey, another planter who had ordered goods. He informed him that Lambeth & Thompson had not paid his bill, and that the reason of it was, that he (Audrey) had not sent down his crop. He wished to know how soon he proposed to send it to them. Audrey further testifies, that when he gave orders to Hazard, he thought of paying him through the defendants, and expected to have funds in their hands to meet his drafts on them. That this arrangement was more convenient for Hazard, for whom it would have been a great deal of trouble to go round the country to collect the amounts due by the several planters for the goods he sold. On another occasion, plaintiff, who had an agent in New Orleans, stopped in the hands of defendants, goods which had been shipped for J. M. Smith, another planter; and gave, as his reason for so doing, that he did not believe that Smith was good. In answer to a letter of the defendants, reminding plaintiff that they had already advised him, that they would only accept under special directions from the planters, given each year, he says: "In regard to the drafts, I have always made it a point to draw on you *through Bank*, only for those about whose accounts I supposed there could possibly be no question, and for whom you would be willing to accept, such as General Thomas, Carnel, and a few others;" thus explicitly admitting that it was optional with the defendants to accept or refuse his drafts, and not cautioning them to keep or return the goods, in case they should see fit not to accept or pay his drafts. Upon the whole, we think that the defendants acted, and were considered throughout, only as agents. As such, they could not be held liable to plaintiff, even had they accepted his drafts, because he knew the circumstances under which such acceptance would have been given. 3 Mart. 640. 10 La. 390. But even had we any doubt as to the capacity in which it was intended that the defendants should act under these orders, we should still come to the same conclusion, because it behoves the party who seeks to render one person liable for the debt of another, to show such liability

beyond all doubt. Civ. Code, art. 3008. If such be the case, the defendants cannot surely be made responsible for the plaintiff's claims on those who ordered the goods, when they have neither assented to his agreement with them, nor accepted the bills sued on. But it is urged that, by paying former drafts, drawn under similar circumstances, and by receiving and forwarding the goods, with the knowledge that under the orders they were to accept the plaintiff's bills, they have made themselves liable, under an implied contract. A mere voluntary payment, in some previous instances, does not, of itself, create an obligation to pay under future, although similar circumstances; and as to the act of receiving and forwarding the goods, it was a duty which the defendants were expected to perform by all parties. The plaintiff, who had an agent here, might have stopped the goods in their hands, as he did on one occasion; or he might have notified them not to forward the goods as soon as his drafts were first refused acceptance. But admitting that an implied contract can fairly be inferred from the acts of the defendants, and that they should not have forwarded the goods without accepting the drafts, it surely cannot create against them a different, or greater responsibility, than would have resulted from an acceptance of the drafts themselves. In order to render Lambeth & Thompson personally liable in either case, it should have been shown that they were provided by the planters with funds, which they failed to apply, as they expressly or impliedly engaged to do. There is no evidence that any of those who ordered the goods had funds in their hands, on the 10th of January, 1842, to pay the amounts drawn for on their agents. Most of them have declared that they considered the payments of plaintiff's bills, previously made by the defendants, as voluntary accommodations to them, as they had sent their crops to pay their debts generally, were in arrears to them, and had given no special directions in relation to the plaintiff's drafts; but that they expected defendants would pay them, as they were in the habit of furnishing their plantations with the usual and necessary supplies every year. Of the fourteen planters, for whose negro clothing the drafts sued on were drawn, five have changed their factors, and nine forwarded their cotton to the defendants last season; but it does not appear that, after paying their debts to the defendants, there remained in the

hands of the latter funds sufficient to pay the plaintiff's bills. In conclusion, the defendants having entered into no direct or personal engagement towards the plaintiff, and not having retained or misapplied any funds placed in their hands to meet his drafts, he has no right of action against them.

It is, therefore, ordered that the judgment of the Commercial Court be reversed, and that ours be for the defendants, with costs in both courts.

Hamner and *I. W. Smith*, for the plaintiff.

W. M. Randolph, and *G. Strawbridge*, for the appellants.

JEROME BAYON *v.* JAMES WALKER BREEDLOVE and others.

A sheriff has a right to retain possession of property sold by him, during the pendency of a rule to show cause why the sale should not be set aside.

APPEAL from the District Court of the First District, *Buchanan*, J.

T. J. Cooley, for the appellants. No counsel appeared for the appellees.

BULLARD, J. The intervenors, Lawrence and Hill, are appellants from a judgment refusing to award to them damages against the sheriff, for the illegal detention of a printing establishment sold by him in this case, and purchased by them. The defence is, that a rule was taken to show cause why the sale should not be set aside for irregularities, and that, pending the rule, he was not bound to deliver the property. The record shows that, soon after the rule was discharged, the press was delivered. Pending the rule, he was justified in retaining possession. He appears to have acted in good faith, and no particular damages are shown; nor does he appear to have been put in default, after the discharge of the rule.

Judgment affirmed.

Therèse de Fontenelle Battaille *v.* The Merchants Insurance Company of New Orleans.

Where a policy of insurance provides that, "in case the insured have any other insurance against loss by fire on the property, not notified to the insurers, nor mentioned in or endorsed upon the policy, or shall afterwards make any other insurance thereon, and shall not, with all reasonable diligence, give notice thereof, and have the same endorsed on the policy, or acknowledged in writing, the policy shall be void," proof that another policy was obtained on the property, which was not notified to the insured, will discharge the latter from all liability.

Where one of the conditions of a policy against fire requires, as part of the preliminary proof, without which no recovery can be had, a declaration under oath, "whether any, and what other insurance has been made on the same property," the insured will forfeit his right to recover by failing to comply with the condition.

Appeal from the District Court of the First District, *Buchanan*, J.

Morphy, J. This action is brought upon a policy of insurance subscribed by the defendants, whereby they undertook to insure the plaintiff from loss, by fire, on dry goods, millinery, fancy goods, &c., contained in a brick store in Chartres street, to the amount of fifteen thousand dollars. The policy mentions that on the same stock of goods insurance had been effected in the Louisiana State, and the Atlantic Insurance Companies, to the extent of seventeen thousand dollars in each. The petitioner represents that the insurance was made by the defendants, for the space of one year from the 22d of January, 1839, and that, within that period, to wit, on the night of the 17th and 18th of August of the same year, the store, and the goods insured, were destroyed by fire. The defendants admitted the execution of the policy, but pleaded the general issue. The case was tried before a jury, who gave the plaintiff a verdict for $7000. A motion to set aside the verdict as contrary to law and evidence, having been made, without success, judgment was rendered accordingly; and the defendants appealed.

Were it absolutely necessary for us to pronounce on the facts of this case as they appear from the record, whatever may be our respect for the verdicts of juries in general, we could with difficulty be brought to give our sanction to that obtained by the ap-

pellee in the present instance. From the papers offered by the assured as preliminary proof, the plaintiff claims that her loss on her own stock of goods was $45,700, independent of her fixtures, and goods on consignment. But if these documents be left out of view, as they must be, because they form no part of the legal and contradictory evidence of the case, and were admitted only to show that such preliminary proof was tendered to the underwriters, the testimony adduced by the plaintiff is of the most vague and unsatisfactory character. It does not show with any reasonable certainty the quantity or value of the goods she had in the store, at or near the time of the fire; while, on the other hand, the defendants have shown a variety of facts and circumstances, calculated to cast doubt and suspicion on her claim as being one grossly exaggerated. But our attention has been called to a point which we take to be decisive of this controversy, and which renders superfluous any comments, on our part, upon the testimony and the facts of the case. 2 Phillips on Insurance, 67.

The policy provides, "that in case the insured have already any other insurance against loss by fire on the property hereby insured, not notified to this corporation, and mentioned in or endorsed upon this policy, *then this insurance shall be void and of no effect;* and if the said insured or her assigns, shall hereafter make any other insurance on the same property, and shall not, with all reasonable diligence, give notice thereof to this corporation, and have the same endorsed on this instrument, or otherwise acknowledged by them in writing, *this policy shall cease and be of no effect;* and in case of any other insurance upon the property hereby insured, whether prior or subsequent to the date of this policy, the insured shall not, in case of loss or damage, be entitled to demand or recover, on this policy, any greater portion of the loss or damage sustained, than the amount hereby insured shall bear to the whole amount insured on the said property," &c.

The policy sued on mentions only two insurances besides that undertaken by the defendants, one effected in the office of the Louisiana State Insurance Company, and one in that of the Atlantic Insurance Company. On the trial below, it appeared from the oral and documentary evidence introduced by the plaintiff her-

self, that there had been a fourth policy underwritten by the Ocean Insurance Company on the same property. This insurance never having been notified to the defendants, nor endorsed on the policy sued on, nor otherwise acknowledged by them in writing, their counsel has urged that the plaintiff cannot recover, as her policy has become void and of no effect. The stipulations relied on by the defendants, are clear, explicit, and free from doubt. They apply, whether the policy taken out of the office of the Ocean Insurance Company was executed before or after the one in suit. In either case, it should have been communicated and endorsed on it. We find, moreover, if we recur to the condition, according to which this contract of insurance was entered into, that the third condition requires, as a part of the preliminary proof without which no recovery can be had, a declaration under oath "whether any, and what other insurance has been made on the same property." By failing to comply with the requirements of the policy, the plaintiff has precluded herself from the right of recovering under it. 1 Phill. Ins. 420. 16 Wendell, 400. 5 Hammond's Ohio Rep. 466. 16 Peters' Rep. 510. In the last case, in 16 Peters, it was held, that notice even of a voidable policy must be given to the underwriters, and that a mere parol notice of such insurance was not, of itself, a sufficient compliance with the stipulations of the policy; but that a prior policy should not only be notified to the company, but should be mentioned in or endorsed upon the policy declared on, otherwise the insurance was to be void and of no effect. The Supreme Court of the United States, in commenting upon the nature, importance, and sound policyof these clauses, say: "They are designed to enable the underwriters, who are almost necessarily ignorant of many facts which might materially affect their rights and interests, to judge whether they ought to insure at all, or for what premium; and to ascertain whether there still remains any such substantial interest in the insured as will guaranty, on his part, vigilance, care, and strenuous exertions to preserve the property." Whatever may be the reason of these stipulations in the policy, they were known to the insured. She has, therefore, no right to complain; for she agreed to comply, on her part, with all the stipulations, in order to entitle herself to the benefit of the contract. Upon no principle

of law or equity can she now call upon this court to relieve her from the performance of her agreement, and yet to hold the defendants to obligations which, but for these stipulations, they never perhaps would have entered into.

It is, therefore, ordered, that the judgment of the District Court be reversed, and that ours be for the defendants, with costs in both courts.

Canon, for the plaintiff.

Grymes, for the appellants.

ASA D. GOVE *v.* BENJAMIN KENDIG.

An appeal will lie from a judgment on a demand in reconvention, where the sum claimed in reconvention is sufficient to give jurisdiction to the appellate court, though the original demand be under three hundred dollars; but the judgment on the latter cannot be examine into. The demand in reconvention is in the nature of a new action.

APPEAL from the Commercial Court of New Orleans, *Watts*, J.

Hiestand, for the plaintiff. No counsel appeared for the appellant.

SIMON, J. This suit was instituted on a note of $190 64. The defendant admitted his signature, but averred that the note sued on was given through mistake and error in fact; that there has been an entire want of consideration, as the note was given for the rent of a store, which, for the time for which the note was given, was untenantable, and of no use or value to him. He further pleaded, that the premises, while in the delapidated and unfinished state in which they were during the time that the rent became due, were an absolute damage to him of more than the amount of the note sued on, and that he has sustained damage to the amount of three hundred and fifty dollars, which he sets up as a reconventional demand against the plaintiff's claim, praying judgment for the amount against the plaintiff.

Judgment was rendered below against the defendant for the amount of the note sued on, from which judgment he has appealed.

A motion has been made by the plaintiff's counsel, to dismiss

this appeal, on the ground that this court has no jurisdiction, plaintiff's claim being for less than three hundred dollars.

It is clear that the plaintiff's demand is not within our jurisdiction; and that, so far as it stands alone and unconnected with the defendant's plea in reconvention, we cannot inquire into the legality of the judgment which condemns the defendant to pay the amount sued for. But the judgment appealed from rejects also the defendant's reconventional demand, which is in the nature of a new action, and amounts to more than three hundred dollars. The right, allowed to a defendant, of reconvening, by opposing to the plaintiff a new demand, which, though different from the main action, is nevertheless necessarily connected with and incidental to it, results from arts. 374 375, of the Code of Practice. This right, which is to be exercised in the same suit, is considered by law as a new action, in which the defendant assumes the character of plaintiff. As such, he is to be heard; and if his reconventional demand amounts to more than three hundred dollars, it is clear that he, and his opponent, should be allowed the constitutional right of appealing from the judgment, which either rejects or maintains the reconvention. We think, therefore, that with regard to the defendant's plea in reconvention, the present case is within our appellate jurisdiction.

On the merits of the reconvention, it does not appear to us that any error has been committed. The evidence which has been adduced to sustain it, is so vague and so unsatisfactory, that we are at a loss to conceive how the appellant could entertain any hope of obtaining relief at our hands. His reconventional plea is clearly unfounded; and were it not that the plaintiff's original claim is under three hundred dollars, and consequently out of our jurisdiction, we should feel no hesitation in mulcting the defendant in the maximum of damages, prayed for by the appellee as for a frivolous appeal.

Judgment affirmed.

FRANÇOIS AUGUSTE *v.* MAGDELAINE RENARD.

Where a note, secured by mortgage, is prescribed, the mortgage is necessarily extinguished. A mortgage can only exist as an accessary to a principal obligation, with the extinction of which it disappears. C. C. 3251, 3252, 3374.

The transfer of a negotiable note, by endorsement, operates a transfer of any mortgage given to secure its payment. C. C. 2615.

APPEAL from the District Court of the First District, *Buchanan*, J.

D. Seghers, for the appellant.

F. B. Conrad, for the defendant.

MORPHY, J. The defendant being sued on a note for $3900, secured by a mortgage on several slaves, set up, among other means of defence, the prescription of five years, under article 3505 of the Civil Code. This plea was sustained by the court below, and judgment entered up accordingly, from which the plaintiff appealed.

The appellant admits that the note is prescribed; but, seeking to separate the mortgage from the note, he contends that his claim is based entirely on the acknowledgment of defendant's indebtedness to him contained in the notarial act, and that, although he has lost all claim under the note, he can yet maintain a personal action on such acknowledgment. This case is not to be distinguished from that of *Shields* v. *Brundige*, 4 La. 326. It is clear that a mortgage can exist only as an accessary to a principal obligation, and that, when the principal obligation is extinguished, the mortgage is without effect. Civ. Code, arts. 3251, 3252, and 3374. By throwing the defendant's obligation to pay into a negotiable shape, and making it transferrable by endorsement and delivery, the plaintiff has subjected it to the prescription of five years, provided by article 3505. A transfer of the note, by endorsement, would have operated a transfer of the mortgage. Civ. Code, art. 2615. How then can it be said that the mortgage is not an accessary of the note, or that it can have any effect after the note has been prescribed. Troplong, Privilèges et Hypothèques, No. 846. Ib., Prescription, Nos. 29-34.

Judgment affirmed.

In the matter of the Tutorship of Rose Aimée Mossy and others, minor children of Toussaint Mossy, deceased.

No legal tutor can be appointed to a minor, unless both the father and mother of the minor be dead. C. C. 281.

Where a mother, the natural tutrix of her minor children, forfeits her tutorship by marrying a second time, without having previously convoked a family meeting to determine whether she shall continue as tutrix, and is re-appointed by the judge, under the advice of a family meeting, she will hold the appointment as a dative tutrix. C. P. 951.

Where the proceedings in a contest relative to the tutorship of a minor, have had no other object than to ascertain which of the parties was legally entitled to the appointment, neither having any personal interest in the matter, the costs will be ordered to be paid out of the estate of the minors.

Appeal from the Court of Probates of the parish of New Orleans, *Bermudez*, J.

Simon, J. Toussaint Mossy, Jr., who died in 1838, left four minor children. His widow was confirmed as their natural tutrix, but sometime in 1842, she contracted a second marriage with André Rey, and, having failed to comply with the requisites of the law, was *ipso facto* deprived of the tutorship. Thereupon, the under-tutor made application to the Court of Probates, to convene a family meeting for the purpose of deliberating on the choice of a tutor. An order was granted accordingly; but before the meeting was held, the widow presented a petition praying to be re-appointed tutrix, which re-appointment she claimed as a legal right. This application was referred to the family meeting, previously ordered. In the meantime, the grandfather of the minors, on the paternal side, petitioned the Probate Court, and prayed to be appointed tutor; but as there was a grandfather on the maternal side, the latter was cited, according to article 952 of the Code of Practice, to show cause why the petitioner should not be appointed. The widow's father answered by denying that this was a case for the appointment of an ascendant; and alleging that if it were, the mother, being the nearest ascendant, and willing to accept the tutorship, was entitled to the preference. He further averred that, if the court should be of a different opinion, he was him-

self, for certain reasons by him stated, entitled to be appointed in preference to the petitioner.

A family meeting having been convened, acted on the application of the widow. Six members had been summoned. Five of them recommended her appointment; but one of them, the grandfather on the paternal side, insisted on his previous demand, and objected to her being appointed; which objection was also made by the under-tutor, who sustained the demand made by the father of the deceased, and sided with him.

Sometime previous, the widow had obtained leave to intervene in the issues made between the two grandfathers, and reiterated her claim to be re-appointed; and she subsequently presented a petition to the Court of Probates, praying that the deliberations of the family meeting above mentioned, might be homologated, and that she might be appointed and sworn accordingly.

On the trial of this case before the lower court, the grandfather on the paternal side, declared, through his counsel, that though he insisted on the appointment of one of the grandfathers, he was willing to yield the preference to the widow's father; whereupon the judge *a quo*, being of opinion that the circumstances of the case made the appointment of a legal tutor necessary, without the intervention of a family meeting, and that the two grandfathers who had applied for the tutorship, had, by the effect of the law, preference over the mother, who, under the present circumstances, could only be entitled to the tutorship by the appointment of the judge, ordered that Jean Baptiste Armant, grandfather of the minors on the maternal side, should be appointed their tutor, and that their mother continue to retain the superintendence of the minors and the care of their education. From this judgment, the widow and her second husband have appealed.

The widow's father, who is the principal appellee, joined issue before this court, by expressing his readiness to submit to our decision, wishing, however, that his daughter, the appellant, might be appointed tutrix of her children.

The first and principal question which this case presents is, whether the Judge of Probates could appoint a tutor by the effect of the law, to the minors Mossy, during the life time of their mother; or, in other words, whether the right given by law to as-

cendants of minors to become their tutors, can be exercised before the death of both their father and mother.

Article 281 of the Civil Code, on which the claim of the appellees is based, is in these words: "When a tutor has not been appointed to the minor *by the surviving father or mother*, or if such tutor, having been appointed, has not been confirmed, or has been excused, then the judge ought to appoint to the tutorship the nearest ascendant in the direct line of the minor." This appointment is made by the judge, without the intervention of a family meeting, which is only necessary where there are two ascendants in the same degree. Civ. Code, arts. 282, 283. Code of Pract. arts. 954, 955. The articles of our Code, upon which this question turns, were mainly borrowed from the Code Napoleon, articles 402 and 403, which contain similar provisions: "*Lorsqu'il n'a pas été choisi au mineur un tuteur par le dernier mourant de ses père et mère*," &c. The only difference between the Napoleon Code and ours, is, that our law has not only provided for the appointment of a legal tutor, when none has been appointed by the surviving father or mother; but also where such tutor, having been appointed, has not been confirmed, or has been excused; whilst in the French Code, it is limited to the first contingency. It seems to us that the very expressions used in the law, "*by the surviving father or mother*," indicate clearly that the tutorship in question only takes place after the death of *both father and mother*, and that during the lifetime of the survivor, the right of the ascendants to claim this tutorship is not open, and cannot be exercised. In support, however, of the doctrine which we are about to establish, and although the text of our law does not appear to us to be susceptible of two interpretations, let us refer to the commentators who have written upon the articles of the French Code corresponding with ours, and see how far they sustain our views upon this subject. Toullier, vol. 2, Nos. 1106 and 1107, after reciting the substance of the article 402, says: "*Mais cette tutelle, n'est admise que dans le cas où le survivant des père et mère est mort sans avoir choisi un tuteur;*" and, among his illustrations showing the cases in which it does take place, he puts the very case now under consideration. Favard de Langlade, *verbo* Tutelle, § 2, entertains the same doctrine, and says: "*Elle n'est ad-*

mise que dans le cas où le survivant des père et mère est mort sans avoir choisi un tuteur. Si donc la mère survivante a perdu la tutelle en se remariant, il n'y a pas lieu à la tutelle légale des ascendants." This last conclusion was adopted by the Court of Cassation, who decided that article 402 was only applicable to the case of the decease of both father and mother. Sirey, 1807, 1st part, p. 156. See also Merlin, *verbo* Tutelle, sect. 2, § 2, art. 1, No. 3. Delvincourt, vol. 1, p. 108. It seems, therefore, clear, that a legal tutor cannot be appointed to a minor, unless his father and mother are *both* dead; and, in the present case, we feel no hesitation in adopting the conclusion, that, although the appellant has lost the natural tutorship of her children by contracting a second marriage, this circumstance does not give rise to the appointment of a legal tutor.

But the question will occur, under what denomination shall the new tutor be appointed? The mother has lost the natural tutorship; there is no testamentary tutor appointed by the deceased; and the ascendants, according to the opinion above expressed, have no right to claim the legal tutorship of the minors. There remains only the dative tutorship, which, under article 288 of our Code, takes place only, "when a minor is an orphan, and has no tutor appointed by his father or mother, nor any relations who may claim the tutorship by the effect of the law, or when the tutor appointed in some of the modes above expressed, is liable to be excluded according to the rules hereafter established, or is excused legally," &c. Toullier, vol. 2, No. 1107, on the subject under consideration, says: "*Si la mère survivante se remarie, et n'est pas maintenue tutrice, il faut recourir à la tutelle dative déférée par le conseil de famille; les ascendants ne sont plus tuteurs de droit.*" This is in accordance with the decision rendered in the case of *Robins* v. *Weeks*, (5 Mart. N. S. 379,) in which this court held, that "the mother who marries a second time, without taking the advice of a family meeting, cannot, in case of re-appointment, be considered as holding the office by natural right, but under the law." She becomes, therefore, a dative tutrix, that is to say, she holds her office under the appointment of the judge, made with the advice of a family meeting, without there being any positive obligation on the family meeting to appoint her. This is clearly the

meaning and purport of article 951 of the Code of Practice, which, without creating another sort of tutorship, in addition to those included in the Civil Code, assimilates the mother to an ordinary dative tutor, saying: "If the minor be the child of a first marriage, and the mother has contracted a second, the judge shall not confer the tutorship on her, during the life of her second husband, except by the advice of a family meeting, duly convoked for that purpose." This law was passed for the undoubted purpose of adding another contingency to those contained in article 288 of the Civil Code, and of giving to the mother, who has lost the natural tutorship of her children, an opportunity, nay, even the right of claiming her re-appointment, and of resuming the administration of the tutorship, in the new capacity of dative tutrix. Her pretensions are to be submitted to a family meeting, who may recommend her to the judge by whom she is to be appointed, and, if appointed, she becomes subject to the same obligations imposed by law on dative tutors. She holds her office under the provisions of the law, and not by natural right.

Under this view of the case, we think the judge *a quo* erred, in appointing J. B. Armant, one of the appellees, as legal tutor to the minor children of Toussaint Mossy, Jr., deceased. As the objection made to the appointment of the appellant, was based only upon the supposed legal right of the grandfathers to be appointed in preference to the minors' mother; and as we are of opinion that such right did not exist, the proceedings of the family meeting recommending the appointment of the appellant, ought to be homologated.

This is a family controversy, in which the sole object of the appellees appears to be to ascertain how far the widow is entitled to resume the tutorship of her children, after having lost it. Neither of them is personally interested in the matter; and it seems that, in order to protect themselves from responsibility, their only desire is that the tutorship shall be entrusted to the party who may be legally entitled thereto. Nay, one of them has even expressed his wish that the appellant may succeed in her application, by being appointed tutrix of her children. Under such circumstances, we think that the costs incurred by the proceedings had before

the lower tribunal, and by this appeal, should be paid out of the minors' estate, for whose benefit they were had.

It is, therefore, ordered, that the judgment of the Probate Court be reversed; that the proceedings and deliberations of the family meeting, recommending the appellant to be appointed dative tutrix of her children, be homologated; that the appellant be confirmed in the said dative tutorship, and appointed accordingly, on complying with the requisites of the law before the Judge of the Court of Probates; and that the costs in both courts be borne by the minors, to be paid out of their estate.

Canon, for the appellants.

L. Janin, contra.

NATHANIEL WOOD *v.* MICHAEL MULLEN and another.

A note dated the 29th of August, payable at six months, will be due on the 3d of March following.

Proof of demand of payment, at the place at which the note is payable, on or after its maturity, is essential to a recovery in an action on the note.

APPEAL from the District Court of the First District, *Buchanan*, J.

T. Slidell, for the plaintiff.

A. Hennen, for the appellants.

MARTIN, J. The defendants are appellants from a judgment on their promissory note. They resisted the claim on an allegation that the plaintiff was not the owner of the note sued upon, but that it is the property of Taylor & Brothers, against whom the defendants have a demand, which they are entitled to plead in compensation. The defendants did not establish their plea; but they contend that judgment ought to have been given against the plaintiff, because he has not complied with the pre-requisite of the law, by making a demand at the place indicated on the face of the note for its payment, on or after its maturity. They state that the note bears date the 29th of August, 1841, and was made payable at the Phœnix Bank, six months after date. The petition alleges no

demand except one, which was made on the second day of March following. The note being due six months after the 29th of August, was so on the 28th of February following, and did not become payable till after the expiration of the three days of grace, to wit, on the 3d of March. This mode of calculating the day of payment of a note, is according to the jurisprudence of this court, as settled in the case of *Wagner et al.* v. *Kenner*, 2 Robinson, 120; and according to the same jurisprudence, a demand of payment, at the place indicated in the note, on or after its maturity, is a pre-requisite to the right of recovery.

The certificate of the judge that the record contains all the evidence is sufficient, independently of that of the clerk. We, therefore, considered it useless to inquire whether the latter can properly certify to that effect, when he has not been called upon to take down the evidence on the trial.

It is therefore ordered, that the judgment be reversed, and that ours be for the defendants, as in case of nonsuit, with costs in both courts.

FELIX GROS *v.* ROSALIE LUPERLE BIENVENU.

Concealment by the vendor of any vice or defect in a slave, is no fraud, unless such vice or defect would furnish ground for redhibition.

APPEAL from the District Court of the First District, *Buchanan*, J.

Train, for the plaintiff.

Beauregard, for the appellant.

MORPHY, J. The defendant enjoined executory proceedings instituted to recover of her a balance due on the price of a slave named Maria, and her two children, François aged six years, and Joseph about two years, sold to her by the petitioner. She alleges that the latter, in the act of sale, warranted said slaves to be free from the vices and maladies provided against by law, but that in so doing he practiced upon her a gross fraud, as the slave Maria was addicted to drinking, had run away from him

prior to the sale, and had been lodged in jail as a runaway, from which place the plaintiff took her, and paid a reward for her apprehension; and as Joseph, one of her children, was, at the time of sale, attacked with an incurable disease, of which he died shortly after. She avers that the plaintiff represented the sickness of the child as having been caused by the measles, and as a slight affection that would shortly pass away, but that such representations were untrue and made only to entrap her, &c. On a rule to show cause why the injunction should not be set aside, the inferior judge, after hearing the evidence, made the injunction perpetual to the amount of fifty dollars, as being the value of the child, Joseph, and dissolved it for the residue of the claim. The defendant appealed, after ineffectually attempting to obtain a new trial.

The evidence adduced has not shown Maria to be addicted to drinking, nor to have been in the habit of running away, as that habit is defined by article 2505 of the Civil Code. It appears, however, that while she was in the possession of the plaintiff, who employed her at times in selling milk and ice cream in the evening, she did not, one night, return to her master's house, and that, at his request, she was arrested by the city guard a day or two after, and lodged in the jail of the Third Municipality, out of which she was taken by the plaintiff, who paid for her apprehension. It is not pretended that before or since this time, she ever left the service of her former or present master; and a number of witnesses, some of whom have owned the girl, testify that she has always borne an excellent character. The appellant's counsel has contended that there was fraud, on the part of plaintiff, in not apprising her of what Maria had done, and in stating to the broker, through whom the bargain was made, that she was a good girl, and had never run away. As Maria had committed but this single transgression, which, under the circumstances, and considering her general good behavior, the plaintiff did not perhaps regard as an actual running away, he might well have believed himself under no obligation to communicate it to the purchaser; nor do we think that he was bound to do it. In the case of *Xenes* v. *Taquino et. al.*, 7 Mart. N. S. 678, we said that, "unless the vice or defect of a slave was one which furnished a ground for redhibi-

tion, there was no fraud in concealing it." The case relied on, of *Gaillard* v. *Labat et al.*, (9 La. 18,) is widely different from the present. In that the slave was *addicted to drunkenness*, unworthy to be trusted, and unfit to be used as a house servant, and she was sold as a *confidential* and *first rate house servant*, trusty, sober, and honest. The court was of opinion that the false assertion of qualities which the slave did not possess, and the concealment of her vices and defects, constituted such a fraud, under article 1841 of the Civil Code, as should vitiate the contract. In the present case, the sale contains the usual guarantee against the vices and maladies provided against by law. Under such a clause, the purchaser cannot complain that the vendor did not disclose a fact which furnishes no ground for redhibition, and which does not necessarily detract from the value or usefulness of the slave sold. The concealment of it has occasioned no loss or inconvenience to the defendant, nor has it procured to the plaintiff any unjust advantage, as the price given for the three slaves, to wit, $1250, cannot be considered in any way extraordinary. After the note sued on was protested, the defendant endeavored to make an arrangement with the plaintiff, and offered him an additional mortgage on a lot of ground. Up to that time, which was more than six months after the sale, she appeared satisfied with Maria; and complaints about her were heard only after the proposed arrangement had failed, and the present suit was about to be brought.

As relates to the child, Joseph, who died shortly after the sale, Formento, a physician, says that he was called to see him at the defendant's house, in September, 1841, the very month in which the sale took place. That he found the boy in a state of marasmus. That he was so low that he could not tell what was the cause of his disease, but that the child must have been sick at least two or three months before he saw him, &c. From this portion of the testimony, coupled with that of the broker, it is clear that, at the time of the sale, the child was sick of the disease of which he died shortly after. We cannot say that the judge erred, in fixing fifty dollars as a fair allowance for the child, Joseph, out of the $1250 given for the family. As he was then sick to defendant's knowledge, and was very young, the value set upon him must have been very small, in proportion to that set

upon the mother, who was a good washer-woman, and the brother who was six years of age, both of whom were conveyed by the same bill of sale.

Judgment affirmed.

Ex Parte John Borden.

The first section of the act of 25th March, 1831, which provides that whenever the Parish Judge of any parish is disqualified by interest, or otherwise, to try any case in the Parish Court, that the District Court shall have jurisdiction thereof, and that the same shall be transferred by the Parish or Probate Court to the District Court, does not contemplate the transfer of all the mortuary proceedings and documents relative to any estate in which the Judge of Probates may be interested. The District Court may take cognizance of the appointment of a curator, where the Probate Judge is interested; but it is not necessary for this purpose, that the papers relative to the succession should be removed from their proper place of deposit.

Application for a mandamus to the Judge of the Court of Probates of Jefferson, *Dugué*, J.

Wolfe, for the applicant.

Bullard, J. John Borden has moved the court for a mandamus, to compel the Judge of the Court of Probates for the parish of Jefferson, to transmit to the Court of the First Judicial District, the papers relative to the succession of James Borden, deceased, in pursuance of the act of 25th of March, 1831,* on a suggestion that the Probate Judge is interested in the matter, having formerly acted as attorney of the absent heirs. This transmission of the papers relative to the estate, is asked, with the

* This act provides—

Sect. 1. That whenever the Parish Judge of any parish is interested in any cases brought, or which may be brought, in the Parish Court or Court of Probates, or is related to either of the parties, so as to be incapable of trying such cases by the existing laws, or is disqualified in any other way by law from trying such cases, the District Court shall have jurisdiction thereof, and the same shall be transferred by such Judge of the Parish Court or Court of Probates, to the District Court.

view of obtaining from the District Court the appointment of a curator to the estate.

We are of opinion that the act referred to does not contemplate, that all the mortuary proceedings and documents relative to an estate in which a Judge of Probates may be interested, shall be transferred to the District Court. Jurisdiction is given to the District Judge in such cases; and if a case be already pending in the Probate Court, the record of that case may, perhaps, be transferred to the District Court. But, in a case like the present, the District Court would be authorized to take cognizance of an application for the appointment of a curator, on its being shown, to its satisfaction, that the Judge of Probates is incompetent, in consequence of interest, without requiring the papers relative to the succession to be removed from their proper place of deposit.

Motion overruled.

WILLIAM LEDYARD HODGE *v.* MICHAEL MOORE.

Art. 2535 of the Civil Code, which provides that where a purchaser, who was not informed before the sale of the danger of eviction, is, or has just reason to fear that he will be disquieted in his possession, by any claim, he may suspend the payment of the price until he be restored to quiet possession, unless the seller prefer to give security, does not contemplate the case in which a purchaser's fear of being disquieted arises from a naked point of law. Every one is bound, at his peril, to know the law.

To put the purchaser in default, the vendor must tender for his signature, an act drawn up in strict conformity to law, and such as the former is bound to sign.

Where, in an action against the purchaser of property sold at auction who had failed to comply with the terms of the sale, for the difference between the price bid by him and that at which it was adjudicated on the second exposure, and for the expenses subsequent to the first sale, it appears that the act of sale prepared by a notary and tendered to defendant, was unaccompanied with the certificate required by law, showing what privileges or mortgages existed on the property, the defendant will not be considered to have been put *in mora*. C. C. 2589, 3328.

The putting a debtor in default, is a condition precedent to the recovery of damages for the violation of a contract. The want of it need not be pleaded, but may be taken advantage of at any time. C. C. 1906.

APPEAL, by the plaintiff, from a judgment of the Commercial Court of New Orleans, *Watts*, J.

Morphy, J. This suit is brought to recover the difference between the price at which two lots of ground were adjudicated to the defendant, and that which they brought on a re-sale at public auction, on his refusal to comply with and carry into effect the first adjudication.

It appears that the defendant, having purchased, in February, 1837, the two lots in question, submitted the plaintiff's title to his counsel for examination. The latter found it good; but, in the meantime, a question was raised in the District Court of this district, whether a merchant, under protest, can lawfully sell his immoveable property. This question was made in the case of *Thompson* v. *Gordon*, and decided in the negative by the District Judge; but his decision was afterwards overruled by this court. 12 La. 263. After this judgment had been rendered, and before its reversal, the defendant, who knew that Hodge was a merchant, under protest at the time of the sale, was advised by his counsel to decline, and accordingly declined, to comply with the terms of the purchase, assigning this decision as the ground of his refusal, and urging upon the plaintiff the propriety of awaiting a final adjudication on the point in the appellate court. The plaintiff refused to wait, and proceeded to the re-sale of the property, under article 2589 of the Civil Code, when it was adjudicated to Andrew Hodge, junr., for $2250, a sum much less than that brought by the first sale. This difference, together with the costs and expenses incurred, is now claimed as damages. The judge below was of opinion that the decision of the District Court was a sufficient ground to justify a party, under similar circumstances, in refusing to take a bill of sale and pay the price, unless security were tendered to him.

L. Peirce, for the appellant.

Briggs, for the defendant. By the law of France, when Pothier wrote, *the commencement of proceedings in eviction* were necessary to authorize the withholding of the purchase money. 2 Pothier, Vente, 281. Paris ed. of 1827. By the Code Napoleon, the price might be also withheld, until security was given, where the purchaser had *any just reason to fear eviction.* Art. 1653. See 3 Delvincourt, 182. Sirey, 1815, part. 2, p. 182. 2 Troplong, Vente, § 609, 610. Duranton, Vente, § 351. The provi-

sions of the Code of 1808, were in conformity to the law in Pothier's time. Ch. 4, art. 15, p. 360. The Code of 1825 has extended the right of the purchaser, to all cases where he has reason to fear eviction. Art. 2535. *Denis* v. *Claque's Syndics*, 7 Mart. N. S. 93. The decision of the District Court, though not a tribunal of the last resort, afforded just reason to apprehend eviction. Before proceeding to a re-sale, plaintiff should have tendered defendant security. *Pontchartrain Rail Road Company* v. *Durel*, 6 La. 481. To put the defendant in default, plaintiff should have tendered an act of sale, such as the law required. The omission of the certificate from the Recorder of Mortgages, is fatal. Civ. Code, arts. 1907, 2415, 2586, 2588, 3328. *Stewart* v. *Paulding*, 6 La. 154.

Morphy, J. We question much the correctness of the decision below. In a government like ours, every citizen is bound at his peril, to know the law applicable to his case; and no one can be permitted to allege his ignorance of the law. We incline to think that article 2535 does not contemplate a case in which the purchaser's fear of being disquieted arises from his doubts on a naked point of law, but one in which his apprehension results from facts and circumstances connected with matters of law, which may render a title defective, or give to a third person some claim to or on the property he has bought. But, be this as it may, the present case must be decided on a different ground, urged by the appellee's counsel. He contends that plaintiff has not entitled himself to the damages he claims, by putting Moore legally in default, before he proceeded to a re-sale of the property. The evidence shows that the defendant was several times requested verbally and in writing, to call at the office of the notary, Cenas, and sign the deed of sale; and that he was notified that, if he failed so to do, the property would be sold on his account and risk, and that he would be held responsible in damages. The notary testifies that, in February, 1837, at the request of Hodge, he prepared an act of sale, from him to Moore, of the property in question. That having met Moore, he told him that the act was prepared, and that Moore answered that he deferred completing the sale in consequence of the pendency of a suit brought for the purpose of testing the power of a merchant, under protest, to

make a good title to real property. That the act prepared has remained since then, with other unfinished acts, in a *cahier*, or book kept for such papers. That as he recollects of no mortgage certificate having been, at that time, applied for or obtained, the act is, in its present state, incomplete, and is such a document as he would not allow a purchaser to sign, unless he insisted upon signing it, and directly waived all its informalities, &c. From this testimony, it is clear that the act of sale which it behoved plaintiff to render to the defendant, in order to put him *in mora*, under article 1907 of the Civil Code, and our decision in *Stewart* v. *Paulding*, 6 La. 153, was not complete. It was not such a conveyance as the purchaser was bound to sign. He was entitled to have an act of sale drawn up in strict conformity with the law, which requires that every notary shall obtain a certificate of the privileges and mortgages existing on the property sold, and shall mention them in the conveyance. Art. 3328. It is true that the same witness adds, that had the parties come before him, at any particular hour, to complete the sale, a certificate could have been procured in a short time. But it might as well be contended that the printed form of a notarial sale, if signed by the vendor, should be considered as a proper title to be tendered, because it could be filled up within a time still shorter than that necessary to procure a certificate, which sometimes requires long researches to be made in the archives of the Recorder of Mortgages. Where a vendor resorts to the highly penal remedy given by article 2589 of the Code, he must be held to the strict requirements of the law. It may be said that the defendant did not specially plead any defect in the title tendered to him, but rested his refusal to carry the sale into effect on the single fact that Hodge was under protest. The putting a debtor in default is, under our law, a condition precedent to the recovery of damages, or the dissolution of a contract. The want of it need not be pleaded in defence, and can at any time be taken advantage of. Civ. Code, art. 1906. 6 Mart. N. S. 229.

Judgment affirmed.

JOSEPH M. KENNEDY and another *v.* SAMUEL W. OAKEY.

A party entitled to the compensation due to the owners of the contiguous lots, from a proprietor of the intermediate ground, who has made use of their walls, may cumulate in one action the debts due for the use of the walls of both owners.

APPEAL from the Parish Court of New Orleans, *Maurian*, J.

This case was submitted, without argument, by *Roselius*, for the plaintiffs, and *T. Slidell*, for the appellant.

MARTIN, J. The petition states, that the plaintiffs are owners of two lots of ground, between which that of the defendant is situated. That the latter, in improving his lot, has made use of the walls of two buildings erected on the respective lots of the petitioners by Sidle and Stewart, under contracts with the petitioners respectively, by which Sidle and Stewart stipulated, and the petitioners respectively promised, that Sidle and Stewart should have the benefit of, and receive whatever sum of money the defendant should become liable to pay, in case, in improving his lot, he should make use of the walls of the buildings so erected on the respective lots of the petitioners. That the defendant has since, in improving his lot, made use of the walls of the buildings so erected, and has become liable to pay for the use of the walls the sum of two thousand five hundred dollars, which the petitioners claim for the use and benefit of Sidle and Stewart.

To this petition the defendant excepted, on the grounds: that it contained two distinct causes of action, absolutely unconnected, which could not be cumulated; that the petitioners can not sue for the use of Sidle and Stewart; and, lastly, that the petition is insufficient, as it does not state the separate and distinct amount of each of the claims, and in not detailing the materials and labor constituting such claims. The exception was overruled. The defendant pleaded the general issue, and prayed for a trial by jury. There was a verdict and judgment for $1587 81 against him, and he has appealed.

Our attention has been arrested by three bills of exception. The first is to the appointment of experts, which was opposed on the ground that the present is not one of those cases in which the Code makes provision for the appointment of experts, and that

such an appointment does not take place in cases to be tried by jury. The second is to the trial of the case by the jury, before the experts had made their report. The third bill is to the admission of parol proof of the title of the plaintiffs to their respective lots.

The defendant had refused to appoint an expert, and those appointed by the plaintiffs and the court had been summoned by the plaintiffs, and were in attendance as witnesses. If, as the defendant contended in his first bill, the case was not one in which experts ought to be appointed, he cannot complain of the trial having proceeded without their report. The petitioners appear to have acceded to the wishes of the defendant, by offering the persons who were named as experts, as witnesses in the case. No parol evidence appears to have been admitted of the titles of the petitioners to their respective lots, except perhaps the reference made to the defendant's lot, as lying between those of the petitioners. Their contracts with Sidle and Stewart, one of which is an authentic one, were admitted in evidence without objection. If the plaintiffs were in possession of their respective lots as lessees, or otherwise than as owners, and had the buildings erected thereon, they were entitled to the advantages resulting from the use of the party walls by the defendant, and might transmit that advantage or benefit to the person they employed to build. It does not appear to us that the defendant is entitled to relief on either of these bills.

Sidle and Stewart are the real plaintiffs in the present case. The nominal ones are their assignors only; and the former might cumulate their two claims in the same manner as they might have cumulated claims on two promissory notes, endorsed to them by different payees. This mode of proceeding avoids a multiplicity of actions, and saves costs.

The Parish Court correctly overruled the exception to the petition.

On the merits, we see no objection to the verdict of the jury, or to the judgment of the court.

Judgment affirmed.

The Second Municipality of the City of New Orleans v. James S. McFarlane.

Under the ordinance of the Second Municipality of New Orleans, of 12th July, 1836, which declares, that the tax levied on the owners of property for the reimbursement of their portion of the expense of paving, "shall be paid in cash within ninety days after the work is done, or in notes endorsed to the satisfaction of the Committee of Finance, at six, twelve, eighteen, and twenty-four months, bearing interest at the rate of eight per cent a year," interest, at that rate, may be recovered from a property-holder who has neglected to pay, within the ninety days, the amount assessed as his share of the cost of such pavement.

Appeal from the Commercial Court of New Orleans, *Watts*, J. This was an action by the Second Municipality of New Orleans, to recover one-third of the cost of certain pavement in front of property belonging to the defendant, with interest at eight per cent per annum, from the expiration of ninety days from its completion. By an ordinance of the Municipality, of the 12 July, 1836, (Ordinances, p. 269,) it is provided that, "the amount of the tax for pavement made in front of the lots of individuals shall, in future, be paid in cash, within ninety days after the work is done, or in notes endorsed to the satisfaction of the Committee of Finance, at six, twelve, eighteen, and twenty-four months, bearing interest at the rate of eight per cent per annum." No note had been executed by the defendant. The pavement was laid down under an ordinance of the Municipality, and its cost was proved. The ownership of the property was admitted.

Rawle, for the plaintiffs.

Larue, for the appellant. Interest at eight per cent can only be allowed, where there has been a special contract to grant delay. There was no agreement in this instance.

Martin, J. The plaintiffs claim from the defendant the sum of eight hundred and twenty-one dollars and sixty-eight cents, with interest at eight per cent, for his proportion of the expenses of the paving of the street before his property. He resisted the claim on the plea of the general issue, &c. There was a verdict and judgment against him, and he has appealed. The case is before us on a bill of exceptions to the charge of the court, instructing the

jury, "that the interest at eight per cent could be received as part of the tax." It does not appear to us that the court erred. The Municipality had the undoubted right of calling on the owners of lots, for a contribution to the expenses attending the paving of the streets before their respective property. In doing so, they might insist that those who delayed payment, should pay interest at eight per cent, the delay being a facility which they were not bound to grant; and the owners might have avoided the payment of the stipulated interest, by an earlier payment.

On the merits, we have seen no objection to the verdict or judgment.

Judgment affirmed.

Anthony Rasch v. His Creditors.

A debtor who, being unable to pay all his debts at the moment, transacts with his creditors and obtains from them a delay, is not an insolvent. The concession of a respite is based upon the supposed solvency, or eventual ability of the applicant to pay all his debts. The laws relative to respite are not insolvent laws.

The debtor who applies for a respite does not seek a discharge from his obligations, nor attempt to impair them. The laws of this State relative to respites are not unconstitutional, nor were they repealed or suspended by the act of congress of 19 August, 1841, establishing a uniform system of bankruptcy.

Appeal from the District Court of the First District, *Buchanan*, J.

Roselius, for the plaintiff.

Chinn, for the appellant.

Garland, J. The petitioner presented himself to the inferior court, alleging that he had a sufficiency of property to pay all his debts, if a reasonable time should be allowed him to sell it, on moderate and fair credits; but that, if he should be forced to meet all the engagements for which he was responsible, as they became due, and to sell his property for cash, he would not be able to pay his debts. He prayed that a meeting of his creditors might be called, and that a respite of one, two, and three years, might be granted him. The creditors assembled before a notary public; an

exhibit of the petitioner's affairs was made; and more than three-fourths of the creditors, in number and amount, agreed to the respite, and it was decreed by the judge.

John A. Miller, who is a creditor of the petitioner, opposed the respite, not for any unfairness or fraud in the proceedings, but on the ground that the law of this State in relation to respite, had been repealed or suspended by the enactment by Congress, in the month of August, 1841, of the law in relation to bankruptcy. The objection was overruled; and Miller then prayed that Rasch might be compelled to give bond and security, that his property, or its proceeds should be applied to the payment of the debts. This was given, and Miller has appealed.

The debt was contracted in this State, although Miller is a resident of Mississippi; and the question is reduced to two points: *first*, is the law in relation to respite, as laid down in the Code, an insolvent law, in the proper and legal acceptation of the term; *secondly*, if it be not, is it in any manner repealed or suspended by the bankrupt law of Congress.

Upon the first point, it will be necessary to ascertain the precise meaning of what a respite is, and also what is understood by insolvency. Bouvier, Law Dict. vol. 2, 363, says: "Respite in contracts, in the Civil Law, is an act by which a debtor, who is unable to satisfy his debts at the moment, transacts (*i. e.* compromises) with his creditors, and obtains from them time or delay, for the payment of what he owes them." Our own Code, art. 3051, is in nearly the same words. Other established authorities give the same definition. Pothier treats of it, under the article relating to the effect of contracts; and, against those creditors who refuse to give the time, he says it is to be considered as a question of equity, as it is not just that the rigor of some creditors should prejudice the interest of all. Pothier, Obl. vol. 1, No. 88. The Civil Code, art. 1980, says, that an insolvent is a person whose estate is not sufficient to pay his debts. This is the legal definition, though the word, according to commercial usage, may have a more extended signification. When we look at the evidence before us, we see that the petitioner has property, estimated to exceed his debts by a very large amount. It is urged, that the proceedings to obtain a respite may eventuate in a cession of property and actual insol-

vency, and that, therefore, in all applications for it, insolvency is to be assumed. This is not so. When the proceedings terminate in that way, it is because the creditors, when they come to examine into the debtor's affairs, find them different from what he has represented them, and find, instead of having sufficient assets to pay the debts eventually, that he is insolvent; and the law so declares him, on their finding. But where a respite is granted, it rests upon the fact of solvency or eventual ability to pay all the debts, and the assent of the creditors establishes the solvency and accords the delay.

Upon the second point, the counsel for Miller relies, with much confidence, upon the cases of *Sturges* v. *Crowninshield*, (4 Wheaton, 122,) and *Ogden* v. *Saunders*, (12 Wheaton, 213). In both these cases, the Supreme Court of the United States was much divided in opinion. There was but a majority of one, in the latter case; and Judge Johnson, in his opinion, says that in the former, the court was greatly divided in their views, and, that the judgment partakes as much of a compromise as of a legal adjudication, and must, in its authority, be limited to the terms of the certificate. 12 Wheaton, 272, 273. The law in relation to respite in this State, has no similarity to the acts of the legislature of New York, which were the subjects of consideration in those cases. In *Sturges* v. *Crowninshield*, the act of the New York legislature of the third of April, 1811, not only liberated the person of the debtor, but discharged him from all liability for any debt previously contracted, on his surrendering his property in the manner prescribed by the act. The Supreme Court said that this was a law impairing the obligation of contracts, within the meaning of the constitution of the United States. The latter case was one, in which the defendant also set up as a defence and bar to the action, a discharge under another insolvent law of the State of New York. The court held that the act had no extra-territorial effect, and could not be pleaded in the courts of the United States, or of another State. In the case before us, the petitioner seeks no discharge from his obligations, nor does he wish to impair their validity. He only says, I cannot pay you now, without ruin to myself, and injury to you and my other creditors; but give me time and all will be paid. We do not see that the granting of so reasonable a demand, is unconstitu-

tional, or prohibited by the act of Congress in relation to bankrupts.

We do not intend to express any opinion, whether, if the creditors of Rasch have acquired under the act of Congress a right to force him into bankruptcy, or shall acquire such a right pending the respite, the proceedings for this respite would defeat the right on the part of the creditors. In such a case, the two laws would, perhaps, be incompatible.

Judgment affirmed.

JOHN A. MILLER *v.* ANTHONY RASCH.

APPEAL from the District Court of the First District, *Buchanan*, J.

Chinn, for the appellant.

Roselius, for the defendant.

GARLAND, J. The defendant, being sued on his promissory note, answered that he had obtained a respite; and that all proceedings against his person and property were arrested by the judgment or order granting it. The exception was sustained, and the suit dismissed. The question seems to us settled, by the opinion given in the case of *Rasch* v. *His Creditors*, which has been just decided.

Judgment affirmed.

ARTHUR H. WALLACE *v.* WILLIAM R. GLOVER and another.

The surety in an attachment, though a resident of a different parish, may, under the third section of the act of 20th March, 1839, be proceeded against, summarily, before the court by which the original suit was decided. The object of that section was to authorize the court before which the action was instituted, to determine all questions, principal and incidental, raised in the course of the proceedings, and thus to secure a speedy adjustment of the rights of the plaintiff.

Whenever a question arises out of a bail bond, it is incidental to the main action, and may be tried summarily, without instituting a new suit.

APPEAL from the Commercial Court of New Orleans, *Watts*, J.

C. M. Jones, for the plaintiff.

L. Peirce, for the appellant.

SIMON, J. The appellant, Franklin, complains, that a judgment was illegally rendered against him for the amount of an attachment bond, which he and another person subscribed, as the securities of the original defendants. The appellant resides in the parish of West Feliciana; and it is contended by his counsel, that he could not be proceeded against by a rule taken against him in the original suit; but that, having his domicil in another parish, a suit ought to have been commenced against him by petition and citation in his own parish and district.

The record shows that an attachment having been levied on a certain steam boat, as the defendants' property, was released on their executing a bond, with the appellant, and another person also residing out of the jurisdiction of the inferior court, as their securities. Judgment having been rendered against the defendants, the steam boat was sold to satisfy the execution subsequently issued; but owing to certain liens and superior privileges which existed on the property, the proceeds of the sale were exhausted in the satisfaction of those privileges; and, nothing having been made on the writ of execution, it was returned, "no other property found." The plaintiff thereupon took a rule on the securities, to show cause why judgment should not be rendered against them for the whole amount of the original judgment; which rule was made absolute, and final judgment rendered thereon accordingly.

The only question which this case presents, grows out of the

appellant's plea to the jurisdiction of the court *a qua*, which is resisted on the ground, that by the third section of an act of the legislature, entitled "An Act to amend the Code of Practice," approved 20th March, 1839, securities on attachment bonds are to be proceeded against *on motion* and *summarily*. The law relied on by the appellee provides: "That article 259 of the Code of Practice be so amended, that, in case of attachment, when the defendant has given his obligation with security, as by said article provided, and fails to satisfy the judgment rendered against him, the plaintiff may, on the return of the sheriff that no property has been found, &c., obtain judgment against the surety, on said obligation, upon motion, after ten days previous notice to said surety; which motion shall be tried summarily, and without the intervention of a jury," &c. Under article 259, the attachment bond is required to be subscribed by a surety residing within the jurisdiction of the court where the action was brought, which is a rule common to all judicial sureties. Civ. Code, arts. 3011, 3033. Hence it may, perhaps, be inferred, that the appellant, by becoming security, made himself a party to the suit between the original parties, and thereby consented to waive the jurisdiction of his domicil. However this may be, it does not seem to us that any doubt can be entertained as to the intention of the legislature in passing the law of 1839. As the law formerly stood, it was, perhaps, required, that the surety, though residing within the jurisdiction of the court, should be proceeded against by a new action; that is to say, by instituting a new suit by petition and citation. Thus, the creditor was driven to the necessity of an increase of litigation, and subjected to useless delays and expense in the exercise of his legal rights. It is manifest, that in order to remedy the evil, the law of 1839 was adopted for the purpose of bringing in the same suit, and before the same court, all the questions or matters, principal and incidental, which might be raised in the course of the proceedings; so that the plaintiff should be entitled to a speedy adjustment of his rights against the persons who, by becoming securities on the bond, had deprived him of his immediate recourse against the property attached, after obtaining judgment against the principal debtor. It is clear that proceeding *by motion*, and trying the motion *summarily*, excludes the idea

that a petition and citation are to be served on the securities, and that a new suit is to be instituted to obtain the object of the law-maker; and it is equally clear, that the law of 1839 would be entirely useless, if it did not deprive such sureties of the right of requiring that they should be proceeded against by a new action. A similar question was brought under our consideration in the case of *Weyman and Thorn* v. *Cater and Cropp*, (17 La. 530,) in which we held, that "whenever a question arises out of a bail bond, either to enforce its payment, or to destroy the surety's liability, such question is incidental to the main action, and may be tried summarily, without the necessity of instituting a new suit;" and we see no reason to change our former opinion.

But it has been urged, that the law requires that every person shall be sued before the judge having jurisdiction over the place of his domicil (Code of Prac. art. 162); and that the law of 1839 was intended only to apply to securities residing within the jurisdiction of the court where the action is brought. The law does not make any such distinction, and is general in its terms. It is true, however, that its provision was adopted in reference to securities on attachment bonds, which securities are required to reside within the jurisdiction of the original suit; but how can this avail the appellant? When he signed the bond, did he not bind himself with a full knowledge of the extent of his liability? Did he not consent to pay the amount of the judgment, if the defendants did not? Did he not know that, under the law of 1839, he could be proceeded against on motion, and summarily? Did he not make himself a party to the suit, and submit his rights to the jurisdiction of the court? This was a right secured by law to the creditor; and it seems to us that the circumstance, that the plaintiff consented to receive the appellant as one of the sureties on the bond, is not sufficient to deprive him of the right. Indeed, it would be presuming that he knew that the appellant's residence, which is nowhere mentioned in the bond, was out of the jurisdiction of the court, and that he abandoned the privilege absolutely given to him by law. This, in our opinion, would be unreasonable; for, although every man is presumed to know the law, the plaintiff cannot be presumed to know the residence or domicil of every citizen in the State of Louisiana; and if this question were

to be tested by the strength of presumptions, we should rather be disposed to give effect to the presumption that the bond was taken according to law, and that, therefore, the plaintiff was induced to believe that the surety resided within the jurisdiction of the court. We think, however, that, as the law now stands, the appellant's plea to the jurisdiction cannot avail him; that wherever be his residence, his character of surety on the attachment bond made him amenable to the tribunal where the main action was pending; and that his declinatory exception was properly overruled.

Judgment affirmed.

THE COMMISSIONERS FOR THE LIQUIDATION OF THE ATCHAFALAYA RAIL ROAD AND BANKING COMPANY *v.* HORACE BEAN and others.

To an action by the Commissioners, appointed under the act of 14th March, 1842, for the liquidation of a Bank, for the amount of a due bill, defendants pleaded in compensation a check in their favor, for an equal amount, drawn on the Bank by a depositor. The check was presented for payment on the 10th of March. A writ of sequestration had been issued against the Bank on the preceding day, but the judgment declaring the forfeiture of its charter was rendered on the 11th of the same month, and not signed until the 15th. *Held*, that the debts were extinguished by confusion on the 10th, when defendants, who were debtors for the amount of the due bill, became creditors for that of the check.

A note, though made payable in dimes, may be discharged by a payment in any other legal coin of the United States.

APPEAL from the District Court of the First District, *Buchanan*, J.

Hoffman, for the appellants.

Barker, for the defendants.

The opinion of the court was delivered by

MARTIN, J. The Commissioners of the Atchafalaya Bank are appellants from a judgment, which compels them to allow the amount of a check on the Bank, in compensation of its claim against defendants, on a due bill of equal amount with the check. The due bill bears date the 13th of January, 1842, and is for eight hundred

and ninety-five dollars, *in dimes, on demand*. There is on the back of it, a credit of ninety-five dollars. The check bears date the 10th of March, 1842, and is for eight hundred dollars. It is in proof that the drawers had money deposited in the Bank for a larger sum, and that the check was presented on the day of its date, and payment refused. At the time that the defendants received the check and presented it for payment, which was on the same day, to wit, on the 10th of March, 1842, there was no judgment of forfeiture. The writ of sequestration against the Bank had been issued and served on the 9th; but the judgment of forfeiture was not given until the 11th of March, and was signed only on the 15th. The defendants being then, to wit, on the 10th of March, creditors of the Bank for eight hundred dollars on the check, and debtors for the same sum on the due bill, the debt was extinguished by confusion; the law itself, without any act of the parties, operating the compensation. Civ. Code, arts. 2203, 2204, 2205, and 2214.

The circumstance of the note being payable in dimes, is perfectly immaterial. It might have been discharged by the payment of eighty eagles, eight hundred dollars, or eight thousand dimes.

Bullard, J. I concur fully in the opinion just delivered; and although the case does not, perhaps, call for such an expression of opinion, yet I think it clear that the legislature cannot constitutionally, by any act subsequent to the creation of a debt, interfere to change or disturb the relation between debtor and creditor, or the relative rank of creditors *inter se*; and that two creditors who stood equal originally in the eyes of the law, and had an equal right to be paid, neither having any special lien or privilege over the other, must forever remain equal, notwithstanding any act of the legislature, apparently sanctioning a different doctrine. I conclude that the section of the act of 1842, relative to the taking in payment of the notes of the Bank, was never intended by the legislature to place the bill holder upon a more favorable footing than the depositor, when they occupied originally the same rank as creditors of the Bank.

Judgment affirmed.

The State v. The Judge of the District Court of the First District.

On a rule upon an attorney, under the third section of the act of 27th March, 1823, to show cause why an information should not be filed against him, it is the duty of the judge by whom the rule was granted, to decide as to the sufficiency of the cause shown. The act does not require that the Attorney General should be notified of, or take any part in this preliminary proceeding.

Application by W. R. B. Wills and T. M. Wadsworth, for a mandamus to the Judge of the District Court of the First District, *Buchanan*, J.

Wills, for the application.

Bullard, J. The petitioners represent that they have preferred charges against Joel G. Sever, an attorney at law, before the District Court of the First District, in virtue of the act of the 27th of March, 1823, providing for the punishment of contempts of court and other offences committed by attorneys at law.*

* This act provides:

Section 3. If any counsellor or attorney at law shall commit any fraudulent practice in any court in this State, or shall betray the interests confided to him by any client, it shall be lawful for the injured party, or for any two members of the bar, to make a complaint thereof to the District Court of the district in which the party accused is domiciliated, if it be in session, or before the judge of said court, if it be not in session; the said complaint must be in writing, stating the facts of the case, and must be supported by the oath of the injured party, or his counsel, when he is the complainant, or by the oath of at least one of the members of the bar by whom the complaint shall be made; the said complaint shall be filed, and if the said court or judge is satisfied that it is duly made, he shall cause the accused party to be summoned to appear at the court-house, there to show cause, in eight days, why an information should not be filed against him; and if no good cause should be shown, an information shall be filed against him accordingly. The said information must contain a clear statement of the facts complained of, with the necessary circumstances of places and dates, in as full and precise a manner as would be requisite in an ordinary criminal information. Whereupon, a jury shall be convened and impannelled for the trial of the said information, the accused having at least ten days' notice of the trial; he shall have a right to challenge, peremptorily, five jurors, and such others against whom he can show good cause of challenge. In all other respects the trial shall be conducted as in ordinary cases of trial for misdemeanor, and a new trial may be granted on the application of the accused, if sufficient cause therefor can be shown. And if the accused be found guilty of the charge made against him, the court may either suspend his license, during a certain period, or vacate and annul it altogether, as they shall judge most fit, according to the circumstances of the case.

That the court issued a rule to show cause, but now refuses to give any final order or decision upon the rule. They pray for a mandamus commanding the Judge of the District Court to make some final order or decree in the premises, or to show cause why he should not.

The judge, in showing cause, recites that part of the act which relates to the instituting of proceedings against delinquent attorneys, which requires that the accused shall be summoned to show cause, in eight days, why an information should not be filed against him; and which goes on to provide, that "if no good cause be shown, an information shall be filed against him accordingly;" and further, that "the trial shall be conducted, as in ordinary cases of trial for misdemeanor." He states, that he caused the Attorney General to be notified of the rule; that evidence was taken before him, as an examining magistrate, under the statute; that after the evidence was closed, it was transmitted to the Attorney General that he might proceed according to law, and under the discretionary powers vested in him as a public prosecutor. It appears that the judge supposed it the duty of the Attorney General to take notice of the cause shown by the accused attorney, and of the evidence against him; while the Attorney General thought it the duty of the court first to decide upon the sufficiency of the cause shown, and either to discharge the rule, or make it absolute.

It is to be regretted that any difference of opinion upon a question so purely technical, should have retarded a prosecution which concerns the honor of the profession, as well as the interests of suitors in our courts. It appears to us that there is but one question in the case, to wit, who is to decide upon the sufficiency of the cause shown why an information should not be filed—whether the judge, or the Attorney General? It is true that the statute does not expressly require the judge to pronounce on the issue made upon the rule to show cause, nor does it make it expressly his duty to order the Attorney General to proceed; but it seems proper that the issue submitted to the judge, should be solved by him judicially, that is to say, that he should decide whether the accused has shown sufficient cause why he should not be prosecuted by information. The statute does not require

that the Attorney General should have notice, or that he should take a part in these preliminary proceedings; and although we are not prepared to say that the Attorney General might not proceed without such previous decision upon the rule, yet it appears to us more regular, under the statute, that the District Court should first pronounce upon the exculpatory evidence, which the attorney may produce upon the trial of the rule.

Let the mandamus issue.

The State v. The New Orleans and Carrollton Rail Road Company.

By the first section of the act of 1 March, 1836, amending the charter of the New Orleans and Carrollton Rail Road Company, it is provided that "the Company shall pay to the State, in ten equal annual instalments from the acceptance of the present act, seventy-five thousand dollars to be employed by the State for the completion of the Attakapas Canal through Lake Verret, whenever such improvements shall have been undertaken and the work actually commenced by the State, or by any Company legally chartered for the purpose." In an action, under this act, by the State, against the Company, who had accepted the act, for the instalments due: *Held*, that the State is entitled to recover, whether the works or improvements have been commenced or not; and that the defendants have nothing to do with the appropriation of the amount they contracted to pay.

A debtor does not, by the indication of another as the person to whom he is to pay, become the debtor of the latter; he continues to be the debtor of his original creditor.

Appeal from the District Court of the First District, *Buchanan*, J.

Roselius, Attorney General, for the State.

T. Slidell, for the appellants.

Simon, J. By the sixth section of an act of the legislature, entitled "An act to amend the act to incorporate the New Orleans and Carrollton Rail Road Company," approved on the 1st of April, 1835, it is provided, that, in case said Company do not build a certain rail road, which is the main object of the act of incorporation, in six years, then said corporation shall pay to the State a *bonus* of twenty thousand dollars annually, during the existence

of its charter. Banking privileges were conferred on the Company, who, under the eleventh section of the act, became obligated to construct and complete the rail road therein described, within six years from the time of its commencement, which was to be within two years from the opening of the books of subscription for the additional capital stock, under the penalty of losing all the extended powers, rights, and privileges granted to the Company by the amendatory act.

On the first of March, 1836, the legislature passed another act, at the request of the Company, amendatory of the act of 1835, by the first section of which it is provided, "that the sixth section of the act hereby amended, and such portion of the eleventh section thereof, as imposes a forfeiture of charter and other penalties, for not commencing the rail road in two years from the period therein defined, and not completing the same within six years from such commencement, are hereby repealed; provided, however, that in lieu of the aforesaid forfeiture and penalty, the Company shall pay to the State in ten equal instalments, from the acceptance of the present act, seventy-five thousand dollars, to be employed by the State for the completion of the Attakapas Canal through Lake Verret, whenever said improvements shall have been undertaken and the work actually commenced by the State, or by any Company legally chartered for that purpose; and the further sum of twenty-five thousand dollars to construct a rail road or causeway between the English Turn and such point opposite to the city of New Orleans, as may be determined by future legislation on this subject; provided, that if, within two years from the passage of this act, no Company be incorporated by the legislature for the construction of said rail road or causeway, the aforesaid sum of twenty-five thousand dollars shall go to the Treasury of the State."

The last recited act was duly accepted by the stockholders of the Company on the 16th of April, 1836; and the present suit, instituted on the 7th of April, 1842, is brought for the purpose of recovering the amount of the several instalments alleged to be due to the State, under the first section of the act of the first of March, 1836.

It is proper to remark, however, that the claim set up by the

State, is confined to the instalments which may be due on the sum of seventy-five thousand dollars, for the benefit of the Attakapas Canal Company; and that with regard to the twenty-five thousand dollars, relative to the English Turn Rail Road, it is alleged in the petition that it has been paid by the defendants, or that satisfactory arrangements for the payment thereof have been made, with a Company incorporated to construct a road between the English Turn and a point opposite the city of New Orleans.

The defendants first pleaded the general issue, and admitted their corporate capacity; but they further averred that, on the 6th of February, 1842, the legislature passed, with due approval, "An act to revive the charters of the several Banks located in the city of New Orleans, and for other purposes," which was accepted by the New Orleans and Carrollton Rail Road Company, immediately after its passage, and before the institution of this suit, for the purpose of voluntarily entering into liquidation; and that the defendants are now, and, since said acceptance, have been engaged in liquidation. They further deny their liability or indebtedness under the laws of the State, and especially those relating to their corporation, and the Attakapas Canal Company.

There was judgment below in favor of the State for the amount of five instalments, ($37,500,) from which judgment the defendants have appealed.

Certain admissions contained in the record, show that the amended charter of the Carrollton Bank, approved 1st March, 1836, was accepted by the stockholders on the 16th of April, 1836; that the act of the 5th of February, 1842, was also regularly accepted on the 7th of March, 1842; that the Bank is now engaged in liquidation under said act; and that the defendants made a compromise with the English Turn Company, this last admission, however, not to be understood as conceding that they were legally liable to said Company.

The claim of the State is resisted on three grounds. *First.* That under the first section of the act of 1836, the *bonus* therein mentioned, for the purpose of completing the Attakapas Canal through Lake Verret, cannot be demanded, as no such improvement or work, as was contemplated by the act, has ever been un-

dertaken, or actually commenced by the State, or by any Company legally chartered for that purpose.

Second. That under the 6th section of an act of the legislature, approved on the 20th of March, 1839, entitled "An act to incorporate the subscribers to the Attakapas Canal through Lake Verret," the President of said Company is alone authorized and empowered to claim the said *bonus* to the amount of twenty-five thousand dollars, so soon as the works shall have been commenced; that the State is, therefore, without any right of action; and that neither the President of the Company, nor any other person in his name, or for the benefit of the said Company, has any right of action, as the works therein mentioned have never been commenced.

Third. That under the provisions of the act of the 5th of February, 1842, the defendants, who have voluntarily accepted the said act for the purpose of liquidation, and who are now engaged in liquidation, and were so before the institution of this suit, are relieved from the payment of the *bonus*, claimed by the State in the present action.

I. From the terms of the first section of the law of 1836, above recited, which is the foundation of the claim set up in this suit by the State, it appears to us immaterial for the recovery of the amount sued for, whether the works and improvements therein alluded to, have ever been commenced or not. The *bonus* is to be paid to the State, in ten equal instalments from the acceptance of the act; and it is not, in our opinion, for the defendants to say, that the money proceeding from their obligation, has not been, or cannot be employed for the purposes therein provided. They have nothing to do with the use, or appropriation of the funds which they engaged to pay; for it is clear, from the simple fact of their having accepted the act, that they are to be considered as having impliedly promised to comply with its provisions, and as becoming bound to pay to the State, at the times therein specified, that amount, to be subsequently employed according to the provisions of the law. The appropriation of the money, or the manner in which it is to be used, cannot be viewed as a condition of the payment of the *bonus;* it only shows how it is to be employed after it is paid or collected, and, as its object is entirely foreign to

the purposes of the act out of which it arises, the defendants have no interest in controlling the use of the funds, and cannot object to paying them to the State, according to the tenor of the obligation contained in their contract, and at the times therein stipulated.

II. The section referred to is in these words: "That so soon as the works shall have been commenced, the President shall be authorized to call upon and receive from the New Orleans and Carrollton Rail Road Company, the sum of twenty-five thousand dollars, in accordance with the provisions of an act, entitled 'An act to incorporate the New Orleans and Carrollton Rail Road Company, and for other purposes,' approved March 1st, 1836, which sum the directors are hereby required to expend in furthering the object contemplated in the charter, and which sum shall be vested in said Canal in behalf of the State of Louisiana." This, in our opinion, contains nothing more than a power or authorization to receive, and is a mere indication made by the State of another person, (the New Orleans and Carrollton Rail Road Company,) who is to pay in its place. It may also be considered as being in the nature of an indication made by a creditor, (the State,) of a person, (the Attakapas Canal Company,) who is to receive for him (Civ. Code, art. 2190); and in such case, Pothier, Obligations, No. 569, considers the act as a *simple mandate*, and says: "*Le débiteur ne devient pas le débiteur de la personne à qui on lui indique de payer; il demeure toujours le débiteur de l'indiquant.*" The State, therefore, never ceased to be the creditor of the defendants for the whole of the *bonus*, subject to a credit for such part thereof as might have been paid to the President of the Attakapas Canal Company, under the provisions of the act above recited; but no payment being shown to have ever been made to the President, this ground of defence cannot, in our opinion, prevail.

III. The 7th section of the act referred to, provides "that any Bank, voluntarily or otherwise, entering into liquidation under this act, on its passage, or at any time thereafter, shall be relieved from the payment of any *bonus* to the State or corporations, *not yet due*, or from the further performance of any public work and improvement *not yet completed*, imposed by its charter," &c. This show-

sufficiently that the legislature never intended to relieve the Banks from the payment of any *bonus* which *was due* at the time of the passage of the act; and as the defendants owed then five of the instalments of the *bonus* sued for, we think the State is entitled to recover them to the amount liquidated by the judgment appealed from.

Judgment affirmed.

JAMES G. BELL *v.* THE FIREMEN'S INSURANCE COMPANY OF NEW ORLEANS.

Parol evidence is admissible to prove an agreement to sell a vessel, anterior to the date of the written act of sale.

One who has agreed to sell a vessel, but has neither delivered it nor received the price, has an insurable interest, the vessel being still at his risk.

To entitle a party to recover on a policy of insurance, he must have had an interest in the thing insured at the time of the loss, as well as at the date of the insurance; and the character of this interest cannot be changed, between the date of the insurance and that of the loss, without the assent of both parties.

APPEAL from the Commercial Court of New Orleans, *Watts*, J.

GARLAND, J. This is an action on a policy of insurance, made on the 5th of September, 1839, by the plaintiff, "on account of whom it may concern," lost or not lost, "on the body, engine, tackle, apparel, and other furniture" of the steam boat called the Bayou Sara, without regard to the name of the master by whom she might be commanded, for the space of twelve months, at a premium of ten per cent. The boat was valued at $20,000, and insurance made for $9000 by the defendants, and for a like sum by another company. The risks insured against were of the sea, river, and fire, and the boat was to navigate the Mississippi, and its tributaries, with certain limitations as to streams and points on them. There is no clause in the policy requiring the assent of the company to any assignment of it, nor forbidding the plaintiff to sell the boat. On the 6th of September, 1839, the plaintiff, by a notarial act, sold and transferred all his right, title, and interest in the boat, to one Northam, for $18,000, payable in six, twelve, and

eighteen months, for which notes drawn by him, and endorsed by different individuals, were given *in payment*, and a special mortgage given in the act on the boat, furniture, &c., to secure the payment of the notes. This mortgage was recorded in the proper office, and a memorandum of it endorsed on the enrollment at the Custom House, when Northam took out a coasting license. Northam commenced running the boat to various places out of the State; but, in a few weeks afterwards, sold one-sixth of her to one Hooper, for the sum of $3000, payable in three instalments, for which he took his notes, and, in the act of sale, retained a mortgage to secure their payment, in which act, Bell's mortgage is mentioned, and Northam promised to pay it. This latter mortgage was also endorsed on the enrollment of the boat. Northam, as master, and Hooper, as clerk, continued to run the boat until about the last of February, 1840, when, at the instance of various creditors, claiming privileges for supplies, services, repairs, &c., the boat was libelled in the District Court of the United States, and taken into possession by the marshal, who placed a keeper on board, and had her secured at the opposite side of the river from this city, where she remained in charge of the keeper, Hooper being frequently on board, and other persons occasionally. On the 19th of April, 1840, the boat, being then advertised for sale under various executions, was consumed by fire, and totally lost. The plaintiff presented the protest of the keeper of the boat, with his preliminary proof and abandonment, and claimed the amount of the policy, which the defendants refused to pay.

In answer to the petition presented against them, the defendants admitted the policy, but denied their liability, as the plaintiff was neither owner nor part owner of the boat, nor had any insurable interest at the time of the loss, or previously. They further averred, that if the plaintiff had any interest at the time of effecting the policy, the nature and character of it were not fully communicated to them, so as to enable them to charge the proper premium, or to refuse the risk. They further stated, that the boat was intentionally set on fire by some person or persons interested in her; but of this we see not the slightest evidence, and this defence is abandoned.

The answer then proceeds to state the various seizures of the

boat, the discharge of all the crew, the fact of her being moored on the other side of the river, far from assistance, with but a single person on board to guard and protect her; wherefore defendants allege that she was unseaworthy; and further, that they are not liable for any loss whilst the boat was in the custody of the marshal, for whose acts and conduct they never undertook to answer.

The evidence does not show how the boat got on fire, but it was probably the work of an incendiary. The deputy marshal, and another person, who was sick, were on board at the time. The former testifies that he was awoke by an alarm of fire, from the crew of another steamer lying near. He immediately rushed to the spot, and attempted to extinguish the flames, but did not succeed, as there was gunpowder on board, which soon exploded. He says that if the crew of the neighboring boat had come to his assistance as requested, or if a crew had been on board, the fire could have been arrested.

The record and proceedings from the United States Court were given in evidence; and in it we find a libel filed by the plaintiff, in which he claims the price of the boat from Northam as a debt entitled to the vendor's privilege, and secured by special mortgage, and, therefore, having a preference over the other creditors. In setting forth the character of his claim, the plaintiff states, in so many words, that on the 6th day of September, 1839, he was the owner of the said steam boat, and sold the same, by notarial act, to Northam. This libel is sworn to by the plaintiff. Upon these facts, and some others which will be noticed hereafter, the plaintiff had a judgment; and the defendants have appealed.

The first point to which our attention is directed, is a bill of exceptions. On the trial, the plaintiff asked Hooper, who was a witness, whether the agreement between Bell and Northam to sell the boat was not previous to the act of sale, to which he replied in the affirmative. To this question and answer the defendants objected, on the ground that it was contradicting the act of sale, and that no evidence of what took place before, or after it, ought to be received; but the court admitted it, because it showed a parol agreement before the written contract was executed. According to the doctrine established by this court in *Shields et al.* v. *Perry*

et al. (16 La. 466), the judge was correct in admitting the testimony, notwithstanding the objection; but there is a much more formidable one to its effect, which is, that it conflicts with Bell's allegation in his libel, that there was no transfer of title until the 6th of September, 1839.

On the merits, the defendants aver:

First. That the plaintiff had not, at the time the policy was executed, any insurable interest in the steamer Bayou Sara, nor any at the time of the loss.

Second. That if the plaintiff had an insurable interest, he did not properly represent the same to the defendants; that the nature of the interest was material to the risk; and that the policy is, therefore, void.

Third. That there was a deviation.

Fourth. That the boat was unseaworthy.

Upon the first point, we have no doubt that, at the time the policy was executed, on the 5th of September, 1839, the plaintiff had an insurable interest in the boat. He was then the owner, and although he had agreed to sell to Northam, there had not been an execution of the contract. The sale was not complete. Neither the boat, nor the notes, had been delivered. The former was still at the risk of Bell, and had it been destroyed on that day, Northam would not have been bound to pay the notes, they being in the possession of the notary, to be delivered when the sale should be executed before him. He, therefore, could insure on that day. But say the defendants, admitting that he had an interest, as owner, at the time of executing the policy, which Bell, in his libel, says was the fact, (and we cannot see how he can avoid the effect of that statement,) yet he had no insurable interest at the time of the loss, as he had previously sold the boat, without the assent of the underwriters. The principle of law, that there must be an interest at the time of the loss, is as well settled, as that one must exist at the time of making the insurance; and we must now inquire, whether the plaintiff had such an interest, at the time of the loss. As before remarked, there is nothing in the policy of insurance, which prohibits the plaintiff from selling the property and transferring the policy. The clause so common in policies, which makes them void in the event of a sale, without the

consent of the insurers, is omitted in this; but this the defendants contend makes no difference, as the nature and extent of the interest is changed, or entirely lost. The plaintiff does not pretend to have had the interest of an owner, since the act of sale, but only that of a mortgagee, or vendor, with a privilege on the boat; and this the defendants say is not covered by the policy, even if it exist. The question is, can the character of the interest be changed, without the assent of both parties, between the time of effecting the insurance and the loss. We think it cannot. If it were in the power of the party insured to change the character of his interest, he might easily make the contract more onerous to the insurer, though it may not be so in the present instance. The case of *McCarty* v. *The Commercial Insurance Company*, (17 La. 366,) seems to have settled the question. In that case, the plaintiff, who was the owner of a house, effected an insurance on it for one year. Shortly after he made a donation of it; and, subsequently, the house was destroyed by fire. He brought a suit on the policy, and we held that the interest which existed and was insured, was entirely divested by the donation, and that the plaintiff could not recover, although he might have a contingent interest, arising from the possibility of the donation being revoked.

Admitting, for the sake of the argument, that the plaintiff has a mortgage, or privilege as vendor, on the boat, to what extent would a policy attach? Clearly no farther than to secure the payment of the debt. If Northam, or any of the endorsers on the notes, have paid, or shall pay them, it is certain that the plaintiff can have no claim on the defendants; and if the latter were to pay the amount of the policy, they would be entitled to the amount of the notes. It is not shown that Northam, and his endorsers, were insolvent; nor that the money cannot be made out of them; nor that proper diligence has been used to recover it.

The equity of this case is, in our opinion, with the plaintiff; and there are some circumstances in it, which induce a strong suspicion that the defendants knew that there was an agreement to sell the boat to Northam, and that a contingent interest was really intended to be insured, although Bell's legal title was not technically divested; but these circumstances are not sufficiently shown to

justify us in affirming the judgment. We think, however, justice requires us to remand the case for a new trial.

The judgment of the Commercial Court is, therefore, reversed, and the cause remanded for a new trial; the appellee paying the costs of the appeal.

C. M. Jones and *L. Peirce*, for the plaintiff.

Micou and *Grymes*, for the appellants.

JAMES G. BELL *v.* THE WESTERN MARINE AND FIRE INSURNCE COMPANY.

APPEAL from the Commercial Court of New Orleans, *Watts*, J.

GARLAND, J. The policy sued on is the one referred to in the opinion this day delivered in the case of *Bell* v. *The Firemen's Insurance Company of New Orleans*, just decided, as taken by another Company for $9000, on the steam boat Bayou Sara, for one year. This policy was executed on the same day as the one in that case, and is the same in every substantial particular. The demand and defence are the same, and the cases were tried together; and in the inferior court the judgment was in favor of the plaintiff. Our judgment, for the reasons given in the case referred to, is adverse to that of the Commercial Court.

The judgment in favor of the plaintiff is, therefore, annulled and reversed, and the cause remanded for a new trial; the appellee paying the costs of this appeal.

C. M. Jones and *L. Peirce*, for the plaintiff.

Maybin and *Grymes*, for the appellants.

JOHN HUGHES *v.* THOMAS B. LEE.

Objections to a verdict lose much of their weight, when not made before the court which tried the case originally. A case will be less readily remanded on a question of fact, where a new trial has not been moved for below. An appeal from the judgment of an inferior tribunal, founded on a verdict, should only be taken after the refusal of a new trial.

The verdict of a jury will not be disturbed, unless clearly wrong.

APPEAL from the Commercial Court of New Orleans, *Watts*, J.

This case was submitted, without argument, by *I. W. Smith*, for the plaintiff, and *Vason* and *Farrar*, for the appellant.

SIMON, J. The plaintiff, who is a shipwright, sues to recover the sum of $1160, for having furnished his blocks and falls, chains, a hulk, &c., for the purpose of raising the steam boat Campté, which was sunk in the Mississippi river, above Baton Rouge. He states, also, that the said articles were much damaged; and that on the return of the hulk, he was obliged to moor it, and get the blocks and falls on shore. The account which he files with his petition, is approved by the then master of the boat, who obtained the articles from him, in the absence of the owners, and who used them for the purpose of raising the steamer; and the defendant is sued, as part owner of the steamer, and as being bound, with others, *in solido*, to pay the amount sued for.

The answer sets up: *First*, that the defendant is not liable to the plaintiff for any sum of money whatever. *Second*, that Gillaud, who approved the account, was not the master of the boat at the time the articles were furnished, and had no authority to contract debts for the steamer Campté; that defendant had a counting house in New Orleans where he resided; and, that in his absence, he had appointed John E. Hyde, as the agent of the boat, &c. *Third*, that the amount claimed is unreasonable, and exorbitant, as one-fourth thereof would be a sufficient compensation. *Fourth*, that the articles furnished were useless and unnecessary.

The case was tried by a jury, who, after a full investigation of the facts, returned a verdict for the plaintiff in the sum of $850; and without attempting to obtain a new trial, judgment having been rendered according to the verdict, the defendant has appealed.

We are called upon to inquire into the correctness of the verdict of the jury, and the appellant appears to have declined the means of obtaining below what he claims now at our hands. We have often said that objections to a verdict lose much of their weight, when not made before the court which tried the cause (9 Mart. 286. 1 Mart. N. S. 717); and that we should remand a cause less readily on a question of fact, if a new trial was not moved for in the lower court. 5 La. 446. In the case of *Carter* v. *Caldwell*, (15 La. 491,) we said, that judgments of inferior tribunals, founded on verdicts of juries, should never come before us, without showing that an unsuccessful attempt has been made below to obtain a new trial. The law allows this right to the party who believes himself aggrieved, and the appellant should have availed himself of it. Code Pact. art. 558. 17 La. 341.

We have however, considered the merits of the case, and it does not appear to us that any error has been committed. We are unable to say that the evidence does not preponderate in favor of the plaintiff. The inferior judge was satisfied of the correctness of the verdict; its correctness was not put in question below; and as the case stands, we must again hold, that the verdict of a jury, on a question of fact, ought not be disturbed, unless clearly wrong and erroneous.

Judgment affirmed.

EDWARD SMITH *v.* ROBERT MCDOWELL.

The purchaser of a slave, to entitle himself to the benefit of the third section of the act of 2d January, 1834, which provides that one who institutes a redhibitory action on the ground that the slave is a runaway or thief, shall not be bound to prove that such vice existed before the sale, when discovered within two months thereafter, where such slave had not been more than eight months in the State, must show that the slave has not resided therein for eight months preceding the sale.

APPEAL from the District Court of the First District, *Buchanan*, J.

Greiner, for the plaintiff.

C. M. Jones, for the appellant.

MARTIN, J. The defendant is appellant from a judgment cancelling the sale of a slave made by him to the plaintiff, and condemning him to the reimbursement of the price, on the ground of the slave being addicted to running away, and not having been, at the time of the sale, more than two months in the State. The sale took place on the 12th of March, 1840; and the slave ran away early in April following, was caught, but ran away again, being the second time within the space of six weeks. No evidence was given of his having run away before the sale to the plaintiff. Defendant relied on the act of the General Assembly of 1834, which provides that the plaintiff, in a redhibitory action, shall not be bound to prove that the habit of running away existed before the date of the sale, whenever said vice shall have been discovered within two months thereafter. This act, however, does not extend to slaves, who have been more than eight months in this State.* The defendant contended that this act ought not to govern the present case, as the slave had been more than eight months in this State before the sale. McClay deposes that he lived with James R. McDowell, in Vicksburg, in the State of Mississippi, who had a plantation on the opposite side of the river, in the State of Louisiana. That James R. McDowell was the owner of a slave named Bob, whom he sent for sale to Robert McDowell, his brother, in New Orleans. That the slave had a wife on his master's plantation, and was a plantation hand. The witness is certain that in the years 1838, 1839, and up to February or March, 1840, the most of the slave's time was spent on the plantation. Sands, a witness for the plaintiff, deposes that, on inquiry by the latter

* The act of 2d January, 1334, provides—

Sect. 3. That the buyer of a slave, who institutes a redhibitory action on the ground that such slave is a runaway or thief, shall not be bound to prove that such vice existed before the date of the sale, whenever said vice shall have been discovered within two months after the sale, and no renunciation of this privilege shall be valid; *provided*, however, that where unusual punishments have been inflicted, this legal presumption in favor of the buyer shall cease; *and provided, also*, that if any redhibitory, bodily or mental, maladies, discover themselves within fifteen days after the sale, they shall be presumed to have existed on the day thereof, any law to the contrary notwithstanding; *and provided, also*, that the provisions of this section shall not apply to slaves who have been more than eight months in this State.

as to the time that the slave had been in Vicksburg, the defendant said that the slave had been there about four years. The plaintiff was bound to prove that the slave had resided for the eight months preceding the sale in Vicksburg, in the State of Mississippi. This he established by the declaration of the defendant. McClay, a witness for the defendant, deposed that the slave spent most of his time on the plantation, before he was sent to New Orleans for sale. This excludes the idea that he resided exclusively on the plantation. The testimony of Sands appears to have preponderated, in the opinion of the judge, over that of McClay. No other witness has said any thing on this point. We are unable to say that the judge erred.

Judgment affirmed.

MICHEL BERNARD CANTRELLE and others *v.* ERASME LE GOASTER.

A debt, as between the debtor and creditor, is indivisible, without the consent of both. A debtor cannot be compelled to pay his debt to a number of transferrees, among whom it may please the creditor to divide it. C. C. 2107, 2149. The provisions of the twelfth chapter, of the seventh title, of the third book of the Civil Code, arts. 2612–2624, must be understood as applying only to entire debts, rights, or claims.

APPEAL from the Parish Court of New Orleans, *Maurian*, J.

Canon, for the appellants.

Benjamin, for the defendant.

MORPHY, J. The petitioners claim, under an assignment by one François Mazerat to them, $2102 40, to be taken out of the last payment to be made to said Mazerat, for certain buildings which he bound himself to erect for the defendant. The latter excepted to their right of action, on the ground that a debtor cannot be sued for portions of a debt due by him, and that no partial assignee can bring suit against such debtor. This exception having been sustained by the judge, the plaintiffs have appealed.

The question presented for our decision, can hardly be considered as an open one in this court. In accordance with the sound-

est principles of law, as well as of reason and equity, we have always held that a debt, as between creditor and debtor, is indivisible without the consent of both; and that, consequently, a debtor cannot be compelled to pay his debt to a number of transferrees, among whom it may have suited the interest or convenience of his creditor to divide it. If he have any legal or equitable defence to set up against the claim, he is not to be subjected to the trouble and expense of litigating his rights with a number of persons, and in different courts. The provisions of the Code relied on by the appellee's counsel, and to be found in the chapter which treats of the assignment and transfer of debts, must be understood as applying only to entire debts, rights, and claims; and cannot be made to interfere with another express enactment in the same work, which declares that an obligation, susceptible of division, must be executed between the creditor and the debtor, as though it were indivisible. If a creditor cannot claim the payment of a debt by portions, it is clear that transferrees, claiming under him, cannot exercise such a right. Civ. Code, arts. 2107, 2149. *King and others* v. *Havard*, 5 Mart. N. S. 193. *Kelso* v. *Beaman*, 6 La. 90. *Miller* v. *Brigot*, 8 La. 535. 6 Toullier, No. 760. 1 Pothier, Oblig., No. 300. Dumoulin, De Dividuorum et Individuorum, 2d Part, Nos. 6, 7.

Judgment affirmed.

MICHEL BERNARD CANTRELLE and others *v.* JULIEN COLVIS and another.

APPEAL from the Parish Court of New Orleans, *Maurian*, J.

Canon, for the appellants.

Benjamin, for the defendants.

MORPHY, J. This case is not to be distinguished from that of the same plaintiffs against Erasme Le Goaster, just decided. On the grounds therein set forth, the same judgment must be rendered.

Judgment affirmed.

Edward Gottheil v. Francis M. Fisk.

The decisions of inferior tribunals in matters addressed to their discretion, will not be interfered with, unless in cases of extreme hardship or manifest injustice.

Appeal from the District Court of the First District, *Buchanan, J.*

Conklin, for the plaintiff.

T. Slidell, for the appellant.

Morphy, J. The defendant prosecutes this appeal from a decree overruling his motion for a new trial below. The record shows that he was cited and held to bail on the 5th of August, 1841; and that, no answer having been filed in the suit, a judgment by default was taken on the 1st of November following, which was made final on the fifth of the same month. In support of his motion for a new trial, the defendant made oath, that he arrived in this city on the 5th of November, 1841, and was informed that a final judgment had been rendered against him on that day; that he was arrested during the vacation of the court, and the temporary absence of his counsel from the city; that being unacclimated, he was driven away by the epidemic which then raged in New Orleans and endangered his life, without having had an opportunity of giving instructions to his counsel for his defence; that on or about the 23d of August, being then at Natchez, he (defendant) wrote a letter to his counsel, J. P. Benjamin, wherein he gave instructions for his defence, which letter he put on board of a steam boat bound to New Orleans, after obtaining from the clerk of the boat a promise that he would place said letter in the post office at New Orleans; and that said letter never reached his counsel, as he has been informed, &c. On the trial of the rule, the defendant offered to file an additional affidavit, in which he declared that he had a just plea of compensation against the plaintiff's claim, of which the latter was well aware when he obtained his judgment; that he holds a due bill of the plaintiff for $250, and one for $100; that he did not mention this fact in his original deposition, nor state it to the counsel who prepared his affidavit, because he did not know that it was necessary to inform him of his defence till after a new trial should be granted, &c.

This last affidavit was rejected by the lower court, on an objection taken to it by the plaintiff's counsel. It came, perhaps, too late, under articles 559 and 561 of the Code of Practice; but should we even allow the defendant the benefit of it, we cannot say that the judge erred in refusing to grant a new trial. The affidavit states no ground which in law entitled him to it. The application was one to the discretion of the inferior court; and in such matters we have always refused to interfere with the decisions of the tribunals of the first instance, unless a case was presented of extreme hardship or manifest injustice. We are unable to perceive any thing of the kind in the present instance. The defendant remained in town more than two weeks after his arrest; and during this interval he was seen several times going into the office of J. P. Benjamin. The latter being absent, he might have employed other counsel. It does not appear that before that time this gentlemen had been his legal adviser; but, on the contrary, it is admitted that during the preceding winter he employed other counsel in a suit in the court below, and had been perfectly satisfied with their management of it. If he was bent upon securing J. P. Benjamin's services, he might have left on his desk a letter, which in all probability would have reached him, as the evidence shows that he was in the city a day or so almost every week during the month of August of that year, and had a younger member of the profession in attendance at his office during his temporary absence. Instead of doing this, the defendant trusted to the chance of a letter, put on board of a steamboat, reaching his counsel. He does not inform us whether he wrote a second letter to him; whether the first had been received; or whether he made any mention in it of the due bills he now wishes to set up as an offset. Upon the whole, we do not think that he made to the judge below, such a showing as should have induced him to open the judgment, especially, when it is considered that his claim, if he has one, is not precluded or destroyed by the judgment, and that he is at liberty to enforce it in due course of law.

Judgment affirmed.

Yldefonso Garcia and another *v.* Their Creditors.

All the parties who are interested that the judgment should remain undisturbed, must be made parties to the appeal, or it will be dismissed.

A creditor of an insolvent, in whose favor a judgment has been rendered, on a tableau of distribution, securing him a privilege or mortgage, must be made a party to any appeal, taken by another creditor, or the syndic, for the purpose of reversing such judgment.

Appeal from the Parish Court of New Orleans, *Maurian*, J.

Labarre, for the appellant.

Canon, contra.

Morphy, J. The syndic, in this case, filed a tableau of distribution, showing that there was nothing coming to the ordinary creditors, and that those who held privileges or mortgages, would have to contribute to the payment of the costs and charges incident to the settlement of the estate. M. L. De Pontalba, a privivileged creditor of the insolvents for house rent, opposed the claims of all the creditors placed on the tableau, and, in particular, that of Victor Debouchel, who was set down as a mortgage creditor, for $6248 39. Her claim for rent was, on the other hand, opposed by Debouchel, as unfounded. After hearing the parties, the the judge below dismissed both oppositions. M. L. De Pontalba has appealed.

The appellant has failed to make Debouchel a party to this appeal. Its dismissal is prayed for on this ground. We have repeatedly held that when a suitor seeks relief, at our hands, against a judgment, he must bring before us all the parties thereto, who might have an interest in its remaining undisturbed. The real party in interest in this controversy is Debouchel, not the syndic. To the latter it must be a matter of indifference who receives the funds he is called upon to distribute, or in what rank the particular creditors are placed on the tableau. If he have any interest at all in a conflict of this kind, it is one adverse to the claim of Debouchel, because the syndic is the representative of the mass of the creditors, who would be entitled to receive a dividend, if this claim were rejected. The law has reserved to the creditors, who are all plaintiffs and all defendants in a *concurso*, the right of

watching over their interests, and of protecting themselves in their individual capacities. When, therefore, a judgment has been rendered, securing to one creditor a privilege or mortgage, on a tableau of distribution, he must be made a party to the appeal by which any other creditor, or the syndic, may seek to have such judgment reversed. 7 Mart. N. S. 447. 15 La. 362. 1 Robinson, 274.

Appeal dismissed.

JOHN QUINCY OSBORNE *v.* ANDREW H. CLAYTON and another.

No appeal will lie from an order discharging a rule to show cause why an injunction should not be dissolved, on the ground that the petition sets forth no legal cause for issuing it. The order is an interlocutory one, and works no irreparable injury. If erroneous, it may be corrected by appeal from the final judgment.

APPEAL from the Parish Court of New Orleans, *Maurian*, J. The plaintiff having enjoined the execution of a judgment obtained against him by the defendants, a rule was taken on the former to show cause why the injunction should not be dissolved, with damages, on the ground that the petition discloses no legal ground for issuing it. The defendants are appellants from an order discharging the rule. The case was submitted, without argument, by *Benjamin*, for the plaintiff, and *Durant*, for the appellants.

MORPHY, J. The defendants are appellants from a decree overruling a motion to dissolve an injunction, sued out by the plaintiff to stay the execution of a judgment they had obtained against him in the inferior court. This appeal is clearly premature, as the order made on the trial of the motion is an interlocutory, not a final, decree. It works no irreparable injury to the appellants. The error, if any has been committed, can be corrected by appeal from the final judgment in the case. Code Pract., art. 566.

Appeal dismissed.

JOHN S. WALTON and another *v.* THEIR CREDITORS.

The fees to which a notary public is entitled for his services being fixed by law, he cannot, under any pretence, demand additional compensation.

APPEAL from the District Court of the First District, *Buchanan*, J.

This case was submitted without argument, by *I. W. Smith*, for the syndics. No counsel appeared for the appellant.

MARTIN, J. Louis T. Caire, the notary in this case, is appellant from a judgment which reduces his claim for professional services, on the opposition of a number of creditors. It is admitted, that on the tableau of distribution the following item is placed, as a privileged claim:—

"L. T. Caire, notary public, for two meetings of creditors and two certificates of mortgage, $354 50."

A witness deposes, that each meeting was adjourned from day to day during three days, and that the office was crowded on each day from nine o'clock A. M. until sun down; that several days were employed in making the tableau, and that during the interval, creditors often came to inquire of the notary how to state their claims; and that the charge is not extravagant. The court reduced the charge of the notary, according to the tariff, to $65 75, observing that "evidence to establish a *quantum meruit*, is entirely misplaced, in relation to those official services for which a tariff is established by law."

It does not appear to us that the court erred. If the fees allowed to notaries by law, for services rendered by them, be insufficient, they must seek relief by an application to the legislature for a new tariff, or by resigning their offices. Courts of justice cannot countenance any other mode.

Judgment affirmed.

Louis Le Page *v.* F. C. Porée and another.

Plaintiff having transferred certain shares of bank stock to a third person, for the purpose of enabling the transferree to raise money thereon, defendant caused a *fi. fa.*, which he had obtained against such third person, to be levied on the stock as the property of the latter. The execution was enjoined by plaintiff, who claimed the stock as his own. On a motion to dissolve: *Held*, that by transferring the stock to enable the transferree to raise money thereon, plaintiff made him the apparent owner, and thereby deceived his creditors; and that the injunction was correctly dissolved.

Appeal from the City Court of New Orleans, *Collins*, J.

Byrne, for the appellant.

Bartlette, for the defendants.

Martin, J. The plaintiff, and his surety in an injunction bond, are appellants from a judgment dissolving the injunction on the ground of the insufficiency of the facts on which it was granted. The petition stated that the plaintiff was the owner of a number of bank shares, which he had transferred to Le Page, Jr., in order thereby to enable him to obtain money; and that the defendant Porée, having a judgment against a firm of which Le Page, Jr. was a member, caused the other defendant, the City Marshal, to levy a writ of *fi. fa.*, issued under the judgment, on said bank shares; whereupon, an injunction was obtained to prevent their sale.

It is clear that the injunction was improperly granted. The plaintiff, by transferring his shares to Le Page, Jr., to enable him to raise money thereon, by loan, made him the apparent owner of them, and thereby deceived his creditors.

There was a motion for a new trial on the grounds:

1st. That the judgment ought to have been one of nonsuit only.

2d. That there was no prayer for judgment against the surety.

3d. That notice of trial ought to have been given to the surety, the attorney of the plaintiff being dead.

The court did not err. If an injunction be granted on grounds which do not warrant it, the party against whom it was obtained has a right to demand its dissolution. Gorman, the surety who appeals, did not sign the original bond; but the record shows that

his name was substituted for that of Chalaron, the surety on the original bond, and that the former, Gorman, subscribed a new bond.

Judgment affirmed.

DANIEL COMSTOCK and another *v.* ANTONIO PAIE and another.

One who had signed a sequestration bond as surety for plaintiffs, but had been released before the trial, another surety having been substituted, is a competent witness for the plaintiffs.

Where the petition prays for a judgment against defendants *in solido*, and one of the latter severs in his answer, but does not plead that the obligation is joint only, and judgment is rendered against defendants *in solido*, it will not be disturbed on appeal.

APPEAL from the District Court of the First District, *Buchanan*, J.

Bartlette, for the appellant, submitted this case without argument. No counsel appeared for the appellees.

BULLARD, J. The appellant, Paie, relies mainly for a reversal of the judgment against him, upon a bill of exceptions taken to the admission of Gyles, as a witness. The objection was, his interest in the case, he having signed the sequestration bond as surety for the plaintiffs. It appears, that, previously to the trial, he had been released, and another surety substituted in his place; nor does the record show that it was too late to permit such a substitution, and thereby remove all objection to the competency of the witness.

It is further objected, that the testimony of a single witness is not sufficient to prove the indebtedness of the appellant. His testimony appears to us to have been fortified by corroborating circumstances, sufficient to justify the verdict.

The appellant's counsel further insists, that the obligation alleged in the petition is a joint one; and that the plaintiffs are entitled to a judgment, at most, for only one-half. To this it is a sufficient answer to say, that the petition claims judgment *in solido*, and the appellant chose to sever in his answer, and did not plead that the obligation was joint, and not *in solido*.

Upon the merits, the evidence satisfies us that no error was committed below.

Judgment affirmed.

Louise Liautaud and another *v.* Manon Baptiste.

Illegitimate children, though duly acknowledged, have no claim against the estate of their natural father, but for alimony. C. C. 224, 257, 913.

The rights acquired by children legitimated by the subsequent marriage of their parents, have no effect against gratuitous dispositions, previously made by the latter. The legitimation has no retroactive effect. It operates only from the date of the marriage. C. C. 219, 948, 1556.

A counter-letter, or something equivalent thereto, is the only proof admissible to establish simulation, not fraudulent, between the parties to a contract, or their representatives. Parol evidence is inadmissible.

A legatee, representing an ancestor, and claiming under him, can have no other means of avoiding a contract, than such as the ancestor possessed.

The father of certain natural children, who had made a sale of all his property to a third person, by a subsequent marriage legitimated his children. After the death of the father, the property was sold to a fourth. In an action by the children against the latter, to recover the property on the ground that the sales were simulated, plaintiffs alleged that it was agreed between the deceased and his vendee that, notwithstanding the sale, the former should remain the owner of the property, which should be reconveyed to him when required, or to his children in case of his death, and that the sale was in the nature of a *fidei commissum*, and, as such, prohibited by law. *Held*, that the interest of the plaintiffs, who were subsequently legitimated, not having existed at the date of the first sale, parol evidence was inadmissible to prove that it was a *fidei commissum*; that the object of the action is to enforce the *fidei commissum* complained of; and that plaintiffs cannot, under the pretext that it was a *fidei commissum*, be allowed to establish the simulation of the sale, and thereby give effect to the very agreement prohibited by law.

The object of the law-maker being to prevent those whom it disables from receiving donations, from secretly enjoying them, all *fidei commissa*, even those in favor of persons capable of receiving, are prohibited. C. C. 1507.

Appeal from the Parish Court of New Orleans, *Maurian*, J.

Simon, J. The petitioners allege, that with their brother and sister, they are the only children of Ferdinand Liautaud and of the defendant, who cohabited together, but were not married when their children were born. That by an authentic act, passed the 16th of April, 1823, their father made a *simulated sale* of all his property to

Marcelite Baptiste, who was a natural daughter of the defendant by another father, and that it was understood and agreed between the vendor and vendee, that, *notwithstanding the said sale, said vendor should always remain the owner of the property, which should be reconveyed to him by the vendee, whenever he should require her to do so; and that, in case of his death, the vendee should convey the said property to said vendor's four children.* They state, that on the 28th of April, 1824, Marcelite Baptiste sold a lot of ground, with the consent and for the account of Ferdinand Liautaud, for the sum of $4000.

The petitioners further show that, on the 6th of August, 1826, their father and mother contracted marriage, in the presence of their children, and of three witnesses, whereby their said children, who had been previously acknowledged, at different times, and who were again acknowledged in the act of marriage, *were legitimated.* That their father died on the 11th of the same month, without having made any testament; and that the petitioners, together with their brother and sister, were his only heirs, and, therefore, entitled to his estate, which consisted in the property conveyed by the simulated sale to Marcelite Baptiste, and which was still in the name of the said Marcelite Baptiste, at the time of their father's death, with the exception of the lot of ground above mentioned.

The petition further states, that although it had been *agreed between the vendor and vendee that all the said property should be reconveyed to the vendor,* or, *after his death, to his children,* and although this was often admitted by said vendee, Marcelite Baptiste, on the 25th of June, 1827, passed a simulated sale of all the property to the defendant. That they (the petitioners) did not remonstrate against the said simulated act, because they continued to occupy portions of the property; and because their mother always assured them that it was passed in her name for convenience, and that the property should be owned by her and her said children jointly, each of them to own one-fifth thereof.

The petition contains further allegations, setting forth the manner in which some of the property had been disposed of by the defendant, and the reasons why, by an act passed in 1835, the petitioners declared that their father had died without leaving any

property; and concludes by praying that they may be declared to be the true heirs of one-half of the property left by the deceased, and, as such, the true owners of the one undivided half thereof, and that the defendant may be condemned to pay them one half of the proceeds of the sales of the property by her disposed of, with interest, &c.

The answer first denies all the allegations contained in the petition, and sets up title and ownership to the property in dispute, in the defendant, by a deed of sale from Marcelite Baptiste, passed on the 25th of June, 1827. The defendant further avers, that she is a third party to, and ignorant of all motives or acts of simulation that may have existed between Ferdinand Liautaud and Marcelite Baptiste; and that her title to the property in dispute can in no way be affected thereby. She also states that, as the plaintiffs claim to be the legitimated children and heirs of the deceased, they cannot avail themselves of the alleged simulation to destroy his own acts; but that, on the contrary, they are bound to make good and warrant unto the defendant the title which she holds, &c.

Under these pleadings, the case was tried, without the intervention of a jury; and, after a full investigation of the proofs of simulation adduced in evidence by the plaintiff, the judge *a quo*, being of opinion that the sale passed on the 16th of April, 1823, and the conveyance from Marcelite Baptiste to the defendant, passed on the 25th of June, 1827, were both simulated, decreed the plaintiffs to be the owners of one-half of the property in dispute, and liquidated the amount due them by the defendant for the one-half of the proceeds of the property sold by said defendant, allowing to one of the plaintiffs, to secure the recovery of his portion, the tacit mortgage given by law to minors on the property of their tutors, said right of mortgage to be exercised on all the property of the defendant. From this judgment, the defendant has appealed.

The evidence satisfactorily establishes all the different acts referred to in the plaintiff's petition, to wit: the deed of sale from Ferdinand Liautaud to Marcelite Baptiste, on the 16th of April, 1823; the sale from Marcelite Baptiste to McNeill, passed on the 28th of April, 1824; the marriage of Ferdinand Liautaud

with Manon Baptiste, celebrated on the 6th of August, 1826; the death of Liautaud on the 11th of August, 1826; the sale from Marcelite Baptiste to the defendant, executed on the 25th of June, 1827; the declaration made by the plaintiffs before a notary public, on the 29th of May, 1835, that their father left no property at the time of his death; and, lastly, the acts of sale executed by the defendant, by which she disposed of some of the property in dispute, for certain prices or considerations by her received previous to the institution of this suit.

Preaux and *L. Janin*, for the plaintiffs. It is objected that the plaintiffs, who are Ferdinand Liautaud's children and heirs, cannot prove by parol the simulation of his sale to Marcelite Baptiste. There would be some force in this objection, if that act were simply a simulated sale, intended to confer an unjust advantage on Marcelite. But it is governed by a different principle. Its real object was a disposition *mortis causa*, or *fidei-commissum*—an infraction of a prohibitive law, and therefore a nullity provable by parol by any person in interest.

By proving the simulation of this sale, we at once show its real object, to wit, a trust for the benefit of the plaintiffs. The relation in which the defendant stood towards the plaintiffs, required, on her part, the utmost good faith. Equity is peculiarly conversant with such relations, and it may not be inapt to consult its principles concerning them. Equity will relieve the children from any undue advantage the parent attempts to obtain. 1 Story's Equity, 224. It will interpose in cases, where, but for such relation, it would abstain from granting relief. Ib. 304–6. In such cases, where, from confidence, the contract has not been reduced to writing, the statute of frauds will not be permitted to be made an instrument of fraud. Ib. 323–4. Similar trusts have been allowed to be proved by parol. Gresley's Equity Evidence, 208. 2 Story's Equity, 444. So where it was agreed that the contract should be put in writing (Fonblanque's Equity, 150, 153); or where there was a part performance, for instance, where the real vendee was let into possession. 1 Maddock's Chancery, 376, 381. *Boyd* v. *McLean*, 1 Johnson's Chancery Rep. 582.

Here Liautaud remained in possession up to the time of his death, and the plaintiffs retained the possesion, and received the

rents of a portion of the property until within a month or two before the institution of this suit, when the defendant expelled them. Liautaud appeared in the act of sale to McNeill, and received the price. The defendant promised to execute a writing.

In France, parol evidence has been let in between the original parties, under circumstances less favorable. Dalloz, Dictionnaire Alphab. vol. 4, *verbo* Preuve Testimoniale, No. 103, p. 50, Nos. 280–3. Jurisprudence du XIX. Siècle, Année 1830, vol. 1, p. 70; Année 1831, vol. 2, p. 303 bis, 573; Année 1832, vol. 1, p. 509.

A circumstance of peculiar force militates in favor of the plaintiffs. Three of the defendant's four children were minors when Liautaud died, and the defendant became their tutrix. She was bound to claim from Marcelite the conveyance to the children agreed on. In case of Marcelite's refusal she ought to have sued her, put her on oath, and have brought against her the abundant evidence which at that time no doubt existed. The defendant would be responsible to her children if she had simply neglected her duty. But in this case there was no reluctance on the part of Marcelite, who was anxious to be relieved from the responsibility, and ready to do whatever the defendant required. By false promises she induced her confiding daughter to pass a sale to herself. There was no fraud on the part of Marcelite. The defendant was alone guilty of it.

The tutrix cannot screen herself under the technical rules applicable to parol evidence. She is charged with fraud, and even if a third person could object to parol testimony, she, as tutrix, cannot.

Continuing to hold out the same promises, the defendant induced three of her children to pass the act of May 29, 1835. This act is, in reality, a compromise; and as it was preceded by no account of the tutorship, is not binding upon the plaintiff Louis Liautaud. Civ. Code, art. 335. The plaintiff Louise Liautaud, was no party to it.

The agreement between Ferdinand Liautaud and Marcelite was a *fidei commissum*. *Fidei commissa* are prohibited from motives of public policy. Civ. Code, art. 1507. Like every infraction of a law *d'ordre public*, they may be proved by parol.

Chardon, De la Fraude, vol. 3, p. 148. 8 Duranton, No. 570. 2 Chardon, 39. This proof is open to the children of the *fidei committens*, from motives of public policy. 3 Chardon, 148. 2 Vazeille, Résumé, 232. If it were denied to them, the object of the law would be defeated, for a person without an interest could not attack the *fidei commissum*. Not only is parol testimony admissible, but strong presumptions will suffice. 2 Chardon, 39. 3 Chardon, 148. See also, *Tournoir* v. *Tournoir et al.*, 12 La. 19. *Fidei commissa* are prohibited by our law, even in favor of persons capable of receiving in another form; and such *fidei commissa* may be proved, by parol, by the heirs of the donor.

By the Roman law, legacies and particular *fidei commissa* were subject to the same rules.

On appelle fideicommis particulier une disposition par laquelle l'héritier, ou un légataire est prié de rendre ou de donner une chose à une tierce personne. Domat, Liv. 4. tit. 2. Des Leg. sect. 1.

Et fidei commissum et mortis causa donatio appellatione legati continentur. L. 87. De Leg. 3.

For the true appreciation of the French authorities, it ought to be observed, that the French Code does not prohibit *fidei commissa* in favor of persons capable of receiving; ours prohibits all kinds. Art. 886 of the French Code, says: "*Les substitutions sont prohibées.*" Art. 1507 of our Code, (the same as art. 40, p. 217 of the Code of 1808,) says: "*Substitutions* and *fidei commissa* are, and remain prohibited." These are the corresponding articles of our own and the French Code. In no part of the French Code are *fidei commissa, eo termino*, prohibited. But art. 911 of the French Code, which is art. 1478 of our Code, declares the nullity of dispositions made in favor of persons incapable of receiving, in whatever form, and under whatever disguise they may be made. These articles, therefore, prohibit *fidei commissa* in favor of incapable persons, the only kind proscribed by the French law. Our law, on the contrary, condemns all kinds of *fidei commissa*, for the reasons so forcibly stated in 12 La. 23. In the French writers we can, therefore, only expect to find authorities concerning *fidei commissa* in favor of incapable persons; but it is obvious, that so far as the admissibility of parol evidence

is concerned, they apply to cases arising under our law, where the *fidei commissum* was intended for the benefit of a person who might legally have received a legacy in another form.

There is no point more clearly established in French jurisprudence, than that concealed, tacit *fidei commissa* may be proved by parol. See, besides, the authorities already quoted, Merlin, Répertoire, *verbo* Preuve, sect. 2, § 3, art. 1, No. 8, *in fine*. (Vol. 24, p. 449 of the Brusselse dition.) Œuvres de Despeisses, vol. 2, p. 584, No. 5. Desquiron, Traité de la Preuve par Témoins, p. 147, No. 286; p. 148, No. 287.

That the heirs of a donor can contest the donation, if it be not made in due form of law—that the heirs of a testator may have a testament set aside, if not made in proper form, are positions too well established to require authorities in their support. By art. 1563 of the Civil Code, no disposition, *mortis causa*, shall be made, otherwise than by last will or testament. If, therefore, a disposition *mortis causa*, be made in the form, and under the disguise of an onerous contract, it is null and void. Where an estate is not insolvent, none but the heirs can question the validity of a testamentary disposition. To deny to the heirs the right of proving, by parol, that an apparently onerous contract is a disguised disposition *mortis causa*, is to declare that any person may dispose of his property, *mortis causa*, in favor of whomsoever he pleases, whether the object of his bounty be incapable or not, provided he adopt the form of an onerous contract. What the consequences of such a principle would be, the court will divine without comment.

The provision of art. 2256 of the Civil Code, which prohibits the reception of parol evidence against and beyond the contents of acts, applies to *contracts* only in cases where it would have been in the power of the party to procure written evidence, such as counter-letters, and not to testaments, or dispositions, which, under whatever form they may be disguised, are really dispositions *mortis causa*. 9 Toullier, p. 232, No. 137.

But it will be said that the plaintiffs were legitimated only five days before Liautaud's death, and that they had the rights of legitimate children only from that period, whereas the sale to Marcelite was passed several years before.

The obvious answer to this is, that the plaintiffs being acknowledged natural children by the act of July 7, 1818, had a right to claim alimony from their father's estate (Civ. Code, art. 257); that if they had never been legitimated, they would still be the only heirs left by Liautaud at the time of his death; and that, therefore, they had the right of contesting the illegal disposition, *mortis causa*, by which that estate was withdrawn from them.

As they were Liautaud's heirs at the time of his death, even had they become such only by the legitimation, they had a right to his estate as it then was. Simulated dispositions, such as a sale to conceal property from creditors, could not be impugned, by parol evidence, by heirs thus situated; but it is far different in regard to dispositions *mortis causa*. If the simulated act be proved to have been a disposition, *mortis causa*, it is the same as if it had been made in the express terms of a will; and the capacity to take under a disposition *mortis causa*, or to contest it, is determined by the law and the state of things existing at the time of the testator's death. As to these, the heir is not considered in law as the same person as his ancestor. For he may set aside a testament for defects of form, although he should be a legatee. The plaintiffs' case is precisely similar. The heir has a right to inquire by what acts, *mortis causa*, the property, which otherwise would have descended to him, is diverted into a different channel; and if these acts are not in compliance with the strict requirements of the law, he may set them aside; these requirements being eminently *d'ordre public*. Hence it also follows, that he can prove their simulated character.

The prescription of five years (art. 3507,) relied on, applies only to the parties to an act. The plaintiffs were not parties to Marcelite's sale to the defendant. Besides the plaintiffs were in possession; the defendant, until lately, always professing her willingness to carry out Liautaud's and Marcelite's intention. There was bad faith on her part; and prescription could commence only from the time when she first claimed an exclusive title and right of ownership.

Soulé, for the appellant. The parties to an act cannot allege simulation, unless they can show a counter-letter, where the

act alleged to be simulated is one of those which must be reduced to writing.

In all cases, except those where there is a counter-letter, simulation can only be invoked by third persons. Merlin, Repert. vol. 31, p. 252, 253. Civ. Code, art. 2256. Toullier, vol. 9, p. 223, 237. Duranton, vol. 13, p. 373. Journal des Audiences, Supp. vol. 8, p. 65. Ib. vol. 9, p. 59.

The act assailed on the ground of simulation, was executed before the plaintiffs were legitimated by the marriage of their father and mother; and they cannot sue to annul acts done by their father previous to their legitimation. Journal des Aud. vol. 9, p. 177.

Were the testimony adduced in the case admissible, it would not conclusively prove the alleged simulation.

The appellant pleads the prescription of five years against the action brought by the appellees. Civ. Code, art. 3507.

Simon, J. Without being necessary to inquire into the facts of simulation established by the parol evidence found in the record, which parol evidence comes up subject to all legal exceptions, (reserved by the defendant's counsel, in the same manner as if he had taken a bill of exceptions,) and will become the subject of a farther inquiry as to its admissibility, the first question which presents itself to our consideration, is, what were the legal rights of the plaintiffs, as children and heirs of Ferdinand Liautaud, at the time of the sale of the property in dispute to Marcelite Baptiste.

It cannot be controverted that, in April, 1823, Ferdinand Liautaud, had no legitimate children; and that the plaintiffs, and their brother and sister, though duly acknowledged by an act passed in 1818, had no other rights to exercise against the estate of their natural father, than those of illegitimate children, who, by law, are only entitled to claim alimony. Civ. Code, arts. 224, 257, 913. They were not the forced heirs of Liautaud, and could raise no pretensions to any part of his estate. But they were legitimated by the subsequent marriage of their natural father with the defendant; and the question occurs, what rights have they acquired by this subsequent legitimation? By art. 219 of the Civil Code, children legitimated by a subsequent marriage, have the same rights, as if they were born during marriage—in the French text, "*nés de ce mar-*

iage." If this article stood alone, it might, perhaps, be said, with some force, particularly under the English and governing text of our law, that the rights acquired by legitimated children, have a retroactive effect, revert back to the time of their conception; and that, therefore, their right to inherit, or to claim their legitimate portion as forced heirs, has effect against the gratuitous dispositions made by their parents since the conception of their children, though before their legitimation. But on referring to art. 948, we see clearly that the law has limited the right of legitimated children to *their taking only the successions which are opened since the marriage of their father and mother*; and under art. 1556, *all donations inter vivos, are to be considered as revoked up to the disposable portion by the legitimation of a natual child by a subsequent marriage, if the child be born since the donation.* Now, it cannot be pretended that the plaintiffs were born since April, 1823; and, if the act of sale attacked in this suit as simulated, instead of being, as alleged, a fictitious sale, were a donation *inter vivos*, it is clear that the plaintiffs could not attack it, nor claim its revocation. The gratuitous title given by their father would stand and have its legal force and effect, notwithstanding the subsequent rights acquired by the children, by virtue of their legitimation. Toullier, v. 2, No. 929, upon an article of the Code Napoleon similar to ours, says: "*Il faut observer que l'effet de la légitimation n'est point rétroactif, et qu'elle ne remonte pas à la naissance de l'enfant. La légitimation n'opère son effet que du moment où existe le mariage qui l'a produite. Tout ce qui s'est passé dans la famille du père ou de la mère avant leur mariage est étranger aux enfans légitimés par ce mariage.*" This doctrine is also entertained by Merlin, *verbo* Legitimation, sect. 2, § 3, art. 4, who gives his opinion on the art. 960 of the Code Napoleon, corresponding with the 1556th of our Code. By Grenier, Donations, vol. 1, No. 193. By Favard de Langlade, *verbo* Legitimation, § 3. By Dalloz, *verbo* Filiation, chap. 3, sect. 1, § 9, who says: "*Leur âge, comme légitimes, ne compte que du jour de la légitimation; tous droits acquis antérieurement sont bien acquis.*" See also, Journal des Audiences, v. 8, Supp. p. 65. Ib. v. 9, p. 177. It results, therefore, from the provisions of our law, as well as from the weight of the authorities above quoted, that

Liautaud was at liberty to dispose of his property as he pleased, in April, 1823; that the sale made then to Marcelite Baptiste, considered either as a sale, or as a disguised donation, or as a simulated conveyance, or in any other manner, cannot be disturbed by persons who had then no legal right to claim against, or to exercise over the property; and that if Marcelite Baptiste had died before disposing of the property, it would have passed to her heirs, without the plaintiffs having any legal capacity to claim or recover any part thereof.

But, instead of keeping the property so as to let it go to her legal heirs, Marcelite Baptiste conveyed it to the defendant; and hence, it has been strenuously contended, that this conveyance, also simulated, was passed in execution of her previous agreement with the vendor, and for the purpose of transferring the property to the plaintiffs and the other children, through their mother. This sale was passed after the legitimation, and if the object thereof, were really such as represented, it would have been more simple to execute the sale directly in favor of the children, to which there was then no possible impediment. However it may be, Marcelite Baptiste gave an absolute title to the defendant, who acted for herself and in her own name. It is clear, therefore, that the plaintiffs possessed no right at the time that the first sale was executed by Liautaud to Marcelite Baptiste; that they only acquired the rights of legitimate children in August, 1826; and it is obvious that the only title they can set up now, is as heirs of the deceased, since the latter period. They have nothing to do with what took place previously; they cannot disturb the acts of their father, and must take his succession in the situation in which they found it at the time of his death, without being able to attack any disposition of his property made previous to their legitimation. In other words, *they merely represent the deceased*, and are only entitled to exercise his rights. If so, how can they be admitted to pretend that the sale from Marcelite Baptiste to the defendant, is the consequence of that from the deceased to Marcelite? If the simulation alleged against the first sale, continued in the second, does this last circumstance give the plaintiffs a greater or better right to claim the property from the defendant, than they would have had against Marcelite Baptiste or her heirs, if she had not

parted with her title to it, and could Liautaud himself have set up any claim to the property as against Marcelite Baptiste, or the defendant, who acquired her rights, on the ground of simulation?

On this part of the case it is proper to remark, that this action is based on the allegations, that the two sales complained of are *fictitious and simulated.* The petition contains no allegation of fraud or error; and we are called upon to give effect to a pretended agreement, said to have existed between the parties, by which it was understood that, *notwithstanding the sale, the vendor should always remain the owner of the property, which should be reconveyed to him by the vendee, whenever he should require Marcelite Baptiste to do so, and that in case of his death, it should be reconveyed to his children.* There is no rule of evidence better known and settled in our jurisprudence, than this, that the fact of simulation admits of no other proof between the parties to a contract, or their representatives, than a counter-letter, or something equivalent thereto. In 2 Mart. N. S. 14, this court said, that where a legatee, representing the ancestor, claims under and through him, he has no other means of avoiding the contract but those which the ancestor possessed; and the principles of law recognized in the case of *Badon* v. *Badon*, 4 La. 169, are fully applicable to the present case. This has been the general and uniform course of our jurisprudence (6 Mart. N. S. 206. 8 Ib. N. S. 448. 3 La. 4. 4 Ib. 351); and in the case of *Delahoussaye* v. *Davis' Heirs, &c.* 19 La. 412, we again recognized the rule, that a simulation, not fraudulent, cannot be proved by parol, as between the parties. Civ. Code, art. 2256. Merlin, *verbo* Simulation. Duranton, v. 13, Nos. 338, 339. Toullier, vol. 9, § 233, 234, 247. It is clear, therefore, that Liautaud himself would have vainly attempted to prove that his sale to Marcelite Baptiste was feigned and simulated, in any other manner than by producing a counter-letter; and that the parol evidence introduced in this case, would have been rejected. If so, surely, the appellees, who represent him, and claim through and under him, cannot be allowed to avail themselves of it.

Under this view of the question, we must come to the conclusion that the appellees were precluded from attacking the contracts complained of on the score of simulation, unless they were

ready to establish it by written evidence; and that the parol evidence excepted to by the appellant's counsel, was improperly and illegally admitted.

The position, however, assumed by the appellees' counsel, that the contracts complained of were in the nature of *fidei commissa*, and prohibited by our law, has been insisted on with a good deal of plausibility; and we must confess that we were, at the first blush, impressed with the idea that it was the stronghold of their case. Further reflection, however, has enabled us to discover the fallacy of the argument, which consists in maintaining that, the agreement between the deceased and Marcelite Baptiste, being a *fidei commissum*, prohibited by law, this infraction of the law can be proved by parol. This would perhaps be true, if the interest of the appellees, adverse to the *fidei commissum*, had existed at the time of the act; and if the alleged disguised illegal disposition, having been resorted to, to defeat these acquired rights, stood in conflict with the exercise of them. But, as we have already said, their interest did not then exist; and it seems to us that they cannot, under the pretence that the contract by them attacked, was executed to cover a *fidei commissum*, be allowed to establish its simulation, and thereby give effect to the very act which the law has prohibited. And indeed, do not the appellees seek to enforce, in this action, the very *fidei commissum* by them complained of? Is not the true object of this suit, under the allegations of the petition, to give effect to the agreement pretended to have existed in their favor between the deceased and Marcelite Baptiste, and to have been subsequently carried into execution by the latter, by the sale of the property in dispute to the defendant; and would not the judgment, which we are called upon to render, be, in effect, declaratory of the appellees' right to recover under the very agreement by them treated as a *fidei commissum?* Surely it would; and we are constrained to declare, that they cannot be entitled to reap the fruits of a flagrant violation of the law, on the part of the person whom they represent, and under whom, and in whose right, they claim. Under the application of the maxim, "*De turpi causa non oritur actio*," the law gives them no action to enforce it. In the case of *Tournoir* v. *Tournoir et al.*, 12 La. 23, relied on by the appellees' counsel, this court held, that the object of the law (Civ. Code, art.

1507,) being to prevent the persons, whom it disables from receiving donations, from secretly enjoying them, all *fidei commissa*, even those in favor of persons capable of receiving, are prohibited. This doctrine is certainly correct, but the case quoted is not analogous to the present. There, the proof was adduced by the party whose interest was adverse to the existence of the *fidei commissum*; and was not introduced for the purpose of giving effect to the illegal disposition of the testator, but in order to defeat its object. Here, on the contrary, were we to admit the evidence offered to prove the alleged simulation, the consequence would be, that, if the fact were sufficiently made out, the appellees would be allowed to recover the property which was the object of the reprobated agreement by them called a *fidei commissum*. Such a doctrine cannot be sanctioned by this court.

Upon the whole, we think the lower judge erred, in receiving the parol evidence introduced by the plaintiffs to prove the fact of simulation, and in giving effect to the agreement declared upon in their petition.

It is, therefore ordered, that the judgment of the Parish Court be reversed; and that ours be for the defendant, with costs in both courts.

ISAAC MARKS and others *v.* THE LOUISIANA STATE MARINE AND FIRE INSURANCE COMPANY.

Plaintiffs, owners of a policy of insurance on freight, finding their port of destination in a state of blockade, abandoned the voyage, and returned without insisting upon receiving their freight. There was a provision in the policy that, "the assured shall not abandon in consequence of the port of destination being blockaded, but the vessel shall, in such case, have liberty to proceed to another port not blockaded, and there end the voyage, or wait a reasonable time for the blockade of the original port of destination to be raised." In an action for the amount of the policy: *Held*, that this clause did not authorize the owners to break up the voyage; and implied nothing more than a consent, on the part of the insurers, to take the risk of proceeding to another port, or of waiting a reasonable time for the blockade to be raised.

APPEAL from the Parish Court of New Orleans, *Maurian*, J.

BULLARD, J. This is an action, upon a policy of insurance, on

freight to be earned by the schooner Dolphin, in a voyage from New Orleans to Matamoras. The plaintiffs allege that the schooner sailed about the 23d of April, 1838, and proceeded with her cargo to Matamoras, where she anchored about the 28th, but was prevented, by a French national brig, from landing her cargo, and compelled to return to New Orleans about the 9th of May. They state that the schooner waited in the port of New Orleans a reasonable time for the raising of the blockade, but that the same still continued at the inception of this suit.

The defendants answer, that, even admitting the schooner was prevented from landing her cargo at Matamoras, by a French armed brig, they cannot be liable, because that port was blockaded by a French naval force, and by the terms of the policy, they (the defendants) are not responsible for any loss or damage occasioned by such an event.

The clause in the policy upon which the defendants rely, is as follows: "The assured shall not abandon in consequence of the port of destination being blockaded, but the vessel shall, in such case, have liberty to proceed to another port not blockaded, and there end the voyage, or wait a reasonable time for the blockade of the original port of destination to be raised."

The facts disclosed on the trial are, substantially, as alleged in the petition. The ports of Mexico on the Gulf were blockaded at the time by an adequate French force, and the schooner was boarded off Matamoras, and forbidden to enter. She thereupon returned to New Orleans. About ten days after her arrival, the cargo was landed, and on the 16th of June, 1838, this action was instituted.

Durell, for the plaintiffs.

L. Janin, for the appellants. It is evident that the Parish Court, when rendering judgment in this case, had either forgotten the clause in the policy which excepts a blockade from the risks insured against, or that its attention had never been drawn to the clause.

The case of *Vigers* v. *The Ocean Insurance Company*, 12 La. 362, is conclusive on this case. The facts of both cases are, in a great measure, similar. There the decision was against the Company, under that clause of the policy, by which "arrests,

restraints, and detainments of all kings, princes, or people of what nation soever," &c., are insured against. The word "blockade" was not found in any part of the policy; but the court held that a blockade was a "restraint." In this case, on the contrary, we have a positive and clear exception of blockades. "The assured shall not abandon in consequence of the port of destination being blockaded, but the vessel shall, in that case, have the liberty to proceed to another port not blockaded, and there end the voyage, or wait a reasonable time for the blockade of the original port to be raised."

Mr. Eustis, the plaintiff's counsel in the case of *Vigers* v. *The Ocean Insurance Company*, acknowledges in his argument, (12 La. 365,) that if this exception, which is in the policies of several other Insurance Companies of this city, had been in that of the Ocean Insurance Company, Vigers could not have recovered.

Bullard, J. The undertaking on the part of the defendants was, that the schooner should earn her freight on a voyage to Matamoras, notwithstanding the ordinary perils of the sea. They did not take the risk of a blockade of the port of destination; but, in that event, the vessel was at liberty to deviate from her direct course, enter another port, and wait a reasonable time for the raising of the blockade. It follows that, if, in consequence of the blockade, the vessel had steered for another port to wait, and had been lost, the underwriters would have been liable, notwithstanding the deviation. But it cannot be fairly concluded from this clause in the policy, that the owners were at liberty to break up the voyage, and give up the cargo to the shippers, from an apprehension that it would be injured by hot weather. They might have insisted upon the payment of their freight, or have waited for the raising of the blockade; for, however deteriorated the cargo may have been on its arrival at the port of destination, the vessel would have earned her freight according to the undertaking of the defendants. The plaintiffs voluntarily put an end to the voyage, without insisting upon receiving their freight.

If, instead of being on the freight, the insurance had been on the vessel, or the cargo itself, it appears to us clear that the assured would not have had a right, under the circumstances presented by this case, to abandon as for a total loss, and to recover of

the underwriters. The absence of a right to abandon on account of a blockade, excludes the right to recover any loss occasioned by such an event. By permitting the vessel, in such a case, to proceed to a different port, nothing more is implied that a consent, on the part of the insurers, to take the risk of proceeding to another port, and during the detention, for a reasonable time, until the blockade may be raised. If the plaintiffs recover in this case, it can only be on the ground, that the blockade put an end to the voyage; and such liability cannot attach, unless a blockade was one of the perils insured against, which is plainly not the case.

The judgment of the Parish Court is, therefore, avoided and reversed; and ours is for the defendants, with the costs in both courts.

FREEMAN FISHER and another *v.* THOMAS B. VOSE.

The object of the act of Congress of the 19th August, 1841, establishing a uniform system of bankruptcy, was, while it released the debtor, to distribute the proceeds of his property as equitably as possible among his creditors, due regard being had to the nature of the different contracts and liens affecting it.

Where a party to a suit pending before a State court, applies to be declared a bankrupt under the act of Congress of 19th August, 1841, the proceedings must be suspended, for a reasonable time, to enable him to file the decree, when the assignee must be made a party. As soon as the decree in bankruptcy is pronounced, the bankrupt, in relation to all actions for and against him except such as the statute prescribes, is legally dead, and can only be represented by the assignee.

Where plaintiff in an action commenced by attachment, has obtained a judgment before defendant's application to be declared a bankrupt under the act of Congress of 1841, he will be entitled to a preference on the property attached. *Aliter*, where defendant's application was made before judgment. In the last case, no privilege is acquired.

APPEAL from the District Court of the First District, *Buchanan*, J.

Winthrop, for the plaintiffs.

Halsey, for the appellant.

GARLAND, J. This action was commenced by an attachment, founded on two bills of exchange, amounting to $1424 20. Two garnishees were cited on the 8th of February, 1842, the day of

instituting the suit. The plaintiffs and defendant are residents of Boston, in the State of Massachusetts. On the 14th of February, 1842, the defendant filed his petition in the District Court of the United States, sitting in Boston, praying to be declared a bankrupt; and, on the 18th of March, the counsel appointed to represent him, filed an exception, stating this fact, and concluded by pleading the surrender by the defendant of his property and his proceedings to be declared a bankrupt, as a bar to this suit, and asking for its dismissal. The fact of the proceedings in bankruptcy, was admitted at the trial. The court overruled the exception, and gave a judgment for the plaintiffs, from which the defendant has appealed.

The question is, whether the commencement of proceedings to obtain the benefit of the act of Congress, approved August 19th, 1841, establishing a general bankrupt system throughout the United States, operates as a bar to proceedings against the petitioner by attachment.

The Constitution of the United States authorized Congress, to pass uniform laws on the subject of bankruptcy. That power has been exercised, and the act mentioned is the result. The third section of the act, vests all the property of the bankrupt, by mere operation of law, in the assignee appointed by the court, with as ample a right as the bankrupt himself had or could have, and proceeds to say, that "all suits in law or in equity then pending, in which the bankrupt is a party, may be prosecuted and defended by such assignee to their final conclusion, in the same way, and with the same effect, as they might have been by such bankrupt." Other sections of the law point out the duties of the commissioners as to receiving evidence of the claims against the bankrupt, and of the assignee in disposing of the property and distributing its proceeds. They all go to show that the object of the law was, whilst it released the debtor, to distribute the proceeds of the property surrendered, as equitably and fairly as possible among the creditors, due regard being had to the nature of the different contracts and liens affecting it. This just and legal right would be entirely defeated, if it were permitted to the creditors of a bankrupt to pursue his debtors and their property, wherever they,

or it, may be, and obtain a preference by attaching and prosecuting suits, without notice to the assignee or any one interested.

As soon as the decree in bankruptcy is pronounced, the bankrupt, in relation to all actions for or against him, except such as the statute prescribes, is legally dead, and can only be represented by the assignee appointed by the court. It is, therefore, clearly the duty of a State court, as soon as it has legal information of the plaintiff or defendant in a suit, having filed a petition praying to be declared a bankrupt, to suspend any further proceedings in the case, until the assignee is legally made a party. The proceedings in a voluntary bankruptcy, in a considerable degree assimilate themselves to our *cessio bonorum* or voluntary surrender of property; and although the act of Congress, unlike our law, does not provide for a cumulation of all actions to which the bankrupt is a party, in the court where the proceedings in bankruptcy may be commenced, still we must bear in mind the great object of the law, and not permit one creditor to get an undue preference over another.

This question, it is stated, has been before the Circuit Court of the United States in Massachusetts, and the reported observations of Judge Story, so fully meet our views, as to render it unnecessary to do more than repeat them.

"By the bankrupt act of 1841," says Judge Story, "the District Courts of the United States are possessed of the full jurisdiction of courts of equity over the whole subject matters which may arise in bankruptcy.

"By the common law, liens exist only in cases where the party entitled to them has the possession of the goods, either actual or constructive; but in the maritime law they are recognized independently of possession, and so in equity jurisprudence. But a lien in equity is not a property in the thing itself, nor does it constitute a right of action for the thing.

"An attachment on mesne process does not come up to the exact definition or meaning of a lien, either in the general sense of the common law, or in that of the maritime law, or in that of equity jurisprudence. At most it is no more than a contingent, conditional security to satisfy the judgment of the creditor, if he ever obtains one.

"A foreign attachment, like a common attachment on mesne pro-

cess, is a remedy directly given and regulated by law to enable a creditor to obtain satisfaction of his debt, and, like every other remedy is liable to be defeated by any act that bars or takes away the remedy or right to judgment under it.

"In case of attachment of the property of a bankrupt, on mesne process, before the proceedings in bankruptcy are instituted, if he obtains a discharge before any judgment is rendered in such suit, such discharge is pleadable as a bar to that very suit, and will prevent the attaching creditor from completing his attachment by a judgment.

"By a decree of bankruptcy, all the property and rights of property of the bankrupt are divested out of him and vested in the assignee, as soon as one is appointed, and such decree relates back to the time of petition; consequently, pending the proceedings in bankruptcy, before or after the decree, an attaching creditor will not be permitted to go on with his suit against the bankrupt, and proceed to trial and judgment, because there can be no party defendant properly before the court.

"If an attaching creditor, with a knowledge of the fact that the proceedings in bankruptcy have been instituted, should nevertheless proceed in his suit to get a judgment against the bankrupt before an assignee is appointed, it would be a fraud upon the law; and if such creditor should obtain satisfaction of his judgment, it *seems* that he would not be allowed to hold the money.

"No attaching creditor, by a mere race of diligence, while the bankrupt proceedings are in progress, will be permitted to overreach and defeat the just rights of other creditors, or the right of the bankrupt, if entitled to a discharge, to plead the same in bar of a judgment in such suit. In such a case the court will enjoin a creditor from proceeding farther in his suit than is necessary to protect his ulterior rights, and will allow the writ and proceedings of the attaching creditor to be entered in the proper court, and to be continued, if the creditor elects so to do, until the discharge of the bankrupt is obtained; but not to proceed in the mean time to trial or judgment. A., by a writ of attachment from the State court, attached the goods of B.; soon afterwards B. petitioned for the benefit of the bankrupt act; and then, fearing that A. might proceed to get judgment, before he could be declared a bankrupt

and obtain a certificate of discharge, and levy his execution upon the goods attached, B. applied to the District Court for an order to stay further proceedings by A. in the suit, and for other relief.

"It was held that the District Court had authority to control the proceedings of A. in the suit; that A. might be permitted to enter his action, and continue it; but that he had no right during the proceedings in bankruptcy, to proceed to a trial and judgment in the suit."

The counsel for the plaintiffs insists upon their right to proceed with the case, because, he alleges, they have obtained a lien or preference, which entitles them to be paid out of the funds attached. There might be some force in this argument, if the defendant had not become insolvent before the judgment; but that fact materially changes the case. Had the plaintiffs gone on, in the ordinary mode, and obtained a judgment against the defendant, they would have been entitled to a preference in being paid by the garnishee, as they would have had a judgment against him; but as no such judgment was obtained, and the debtor has become insolvent, it has been long settled by this court that no privilege is created. 12 Mart. 32.

It is further said, it may turn out that the application of the defendant to become a bankrupt will be rejected, and that it would be highly injurious to the plaintiffs to have their action dismissed, or their proceedings arrested. This may be true; and as there is no evidence, in this case, that a decree in bankruptcy has ever been rendered, we think the proceedings should only have been suspended, for a reasonable time, to enable the party to file the decree, when it would be the duty of the plaintiffs to make the assignee a party, upon whose appearance the legal rights of the parties might be settled.

We cannot imagine any step likely to produce more confusion, than permitting a course like the present to be pursued. The creditors and debtor both reside in the same city. The former finding the latter on the eve of bankruptcy, despatch the evidence of their debt to a distant state, where the debtor has property; sue out an attachment, and claim an exemption from the proceedings in bankruptcy, which are pending at their own door. The bankrupt law would be any thing but uniform, if such proceedings were tolerated.

We think the District Judge erred in not sustaining the defendant's exception, in part; and in proceeding to give judgment in favor of the plaintiffs.

The judgment of the District Court, is, therefore, reversed, and the cause remanded, with directions to the judge to suspend proceedings in it, until the decree in bankruptcy, if one has or shall be obtained, be filed; and upon the production of it, and on the assignee being made a party; to proceed according to law and the principles herein expressed; the appellees paying the costs of this appeal.

SAME CASE—ON AN APPLICATION FOR A RE-HEARING.

Micou, for a re-hearing. The parties reside in Boston. The plaintiffs, on the 9th February, 1842, attached the rights of the defendant for debt, in the hands of certain garnishees residing in New Orleans. On the 14th February, in Boston, the defendant filed his petition, under the bankrupt law of the United States, praying to be declared a bankrupt. The attorney appointed by the court from which this appeal is taken, to represent the absent defendant, pleaded "the surrender of the bankrupt's property and his act of bankruptcy, as conclusive of all suits, whether by attachment, or otherwise." The fact of the filing of the petition, to be declared a bankrupt, was admitted; but the exception was overruled, and judgment rendered for the plaintiffs. The defendant, by his counsel appointed, &c., has appealed. On the 17th May, after the appeal had been filed in this court, upon the suggestion of the counsel for the defendant that a decree of bankruptcy had intervened, "it was ordered that George F. Kuhn, assignee, be made a party to the suit, in lieu of the defendant." The record does not show that there was any appearance on the part of the assignee, nor that any steps were taken to make him a party to the proceedings. The counsel of the defendant has contended, that the filing of the petition to be declared a bankrupt, operates as a supersedeas or stay of proceedings in the State

court; and that the court below could proceed no further in the case, until the appearance of the assignee. The opinion pronounced by this court recognizes the position, and, accordingly, remands the case, and orders the court below to allow a reasonable time for the appearance of the assignee, and then to proceed in accordance with the views expressed in the opinion.

It was not until this opinion had been pronounced, that the counsel, now appearing, became interested in the case, and prayed for time to present a petition for a re-hearing. The court, willing to hear and examine all that could be urged against its opinion, and no doubt desirous that its decision on a point of such delicacy and importance, should not, when final, incur the imputation of having been pronounced without proper deliberation, granted time. Under the circumstances of the case now presented, it devolves upon the court to determine what effect is produced upon judicial proceedings, both as to the property and person of a bankrupt, by proceedings in bankruptcy under the late law of Congress.

The 3d section of that act declares, that all the property, &c. of every bankrupt, "who shall, by a decree of the proper court, be declared to be a bankrupt within this act, shall, by mere operation of law, *ipso facto, from the time of such decree*, be deemed to be divested out of such bankrupt," &c.; "that the same shall be vested, by force of such decree, in such assignee," &c.; and that "the assignee shall be vested with all the rights, titles, powers and authorities, to sell, manage and dispose of the same, *and to sue for and defend the same*, as fully to all intents and purposes, as if the same were vested in or might be exercised *by such bankrupt*, before or at the time of his *bankruptcy declared* as aforesaid."

The words used are plain, concise and exclusive. It would seem, that if the estate is divested *from the time* of the decree, it is not divested before the decree; and, consistent with itself, the law, recognizing the bankrupt to be the owner until the decree, leaves to him the prosecution and defence of all suits involving the rights of the property, until an assignee be appointed and authorized to succeed him. The same section provides, that "all suits in law and equity, *then pending*, in which such bankrupt is a party, may be prosecuted and defended by such assignee," &c.

If the question is to be decided under these provisions of the

law, it is easily put at rest. The language is plain beyond the necessity of interpretation. The bankrupt remains the owner and represents the property in court, as well as out of court, until the decree; then his place is filled, *quoad the property*, by the assignee. In regard to his personal rights and his future property, the bankrupt himself remains their guardian. To make the application to the case before the court, we would say that the exception filed should not have been regarded, and that the court should have proceeded, as it did, to give judgment against the bankrupt, who was the only defendant in the cause. The rights of the assignee, if one were appointed, would not be precluded by the judgment.

The only expression in the law itself relied on to control the provisions of the third section, is that contained in the first section. It declares that any debtor whose debts, are of a certain character, filing his petition in the form prescribed, " shall be deemed a bankrupt within the purview of the act, and may be so declared," &c. The argument, then, assumes, that the debtor, being deemed a bankrupt from the date of the petition, the decree, when pronounced, necessarily reverts to the date of the petition, and that the property is therefore divested *from that date;* in other words, that the consequence of being *deemed* a bankrupt, is the divesting of the property and judicial rights. But we must not forget that this is the sole act of the United States upon the subject of bankruptcy; that there is no law, either common or statute, of the United States, which says that a bankrupt shall have no rights of property; and, that our ideas of the effect of bankruptcy, are derived principally from the English law. There is nothing in the meaning of the word bankrupt, any more than in the word insolvent, that necessarily implies a divesting of property. If the law fixed no time, *from which* the decree, when pronounced, should operate, the courts would hardly be justified, under this expression, in giving it a retroactive effect. Still less can so remote an inference control the positive provisions of the law.

The counsel argues, that the supposed stay of proceedings from the filing of the petition, and the relation back to that date of the powers of the assignee, result—

First. From the object and intent of the law itself.

Second. From the established principles and cases under bankrupt laws in general.

Third. From the spirit and policy of the bankrupt laws of Louisiana.

Before considering any of these arguments, we must advert to the first principles or rules of interpretation. The object of construction is to ascertain the will of the legislator. If the words of the law are plain—if one part of the law does not contradict another, nothing remains for interpretation. The will of the lawgiver being understood, courts have only to carry it into effect. "When a law is clear and free from all ambiguity, the letter of it is not to be disregarded, under the pretext of pursuing the spirit." Civil Code, art. 13.

So Blackstone, vol. 1, p. 59, says, the *words* of the law in their ordinary meaning, are *first* to determine the will of the legislature. It is only when the language of the law is ambiguous or obscure, that judges are permitted to resort to the *context*, the *subject matter*, the *effect* and *consequences*, or *the reason and spirit of the law.*

There being nothing ambiguous in the language of the third section—there being nothing in the law itself contradicting its expressions, it might well be assumed that the words of that section put an end to the argument. But a proper deference for the authorities cited, and for the court itself, which has pronounced an opinion adverse to these views, admonish me that it may be unsafe to rest upon even these indisputable principles.

In examining the positions taken by the opposite counsel, I will reverse the order adopted by him, and first consider the enactments of other systems of bankruptcy, because, by comparing them with our own when analogous, and by contrasting them when different, we shall be better prepared to form a correct opinion of what was the true intention of Congress upon this important point. The statute of 13th Elizabeth, c. 7, gave to the commissioners in bankruptcy "full power to dispose of all the lands and tenements of the bankrupt, which he had in his own right, *when he became a bankrupt*, or which shall descend to him," &c. 2 Blackstone, 285.

"By virtue of the statutes of 1 Jac. I, chap. 15, and 21 Jac. I, c. 19, all the personal estate and effects of the bankrupt, are con-

sidered as vested, by the act of bankruptcy, in the future assignees of his commissioners." 2 Ib. 485.

"The property vested in the assignees, is the whole that the bankrupt had in himself, *at the time he committed* the first act of bankruptcy," &c. 2 Ib. 485. For the words of the statutes, see Bacon's Abridgment, *verbo* Bankrupt. As the act of bankruptcy might have long preceded the suing out of the commission, the dealings of the bankrupt with others, even without notice, were liable to be set aside, and great injury and injustice frequently resulted. Hence the necessity of modifying the doctrine of relation was soon felt, and various exceptions were made, from time to time, by the laws. These exceptions are stated in their order, in Eden on Bankruptcy, (258–9, London edition,) and, with every other portion of the bankrupt code of Great Britain, were digested in the consolidating act of 6 Geo. 4, c. 16. By the statute of 2 & 3 Vict. c. 29, "all dealings and transactions with any bankrupt, *bona fide* made and entered into before *the date and issuing of the fiat* against him, and all *attachments and executions* against the lands and tenements or goods and chattels of the bankrupt, *bona fide* executed or levied before the date and issuing of the fiat, shall be deemed to be valid, notwithstanding any prior act of bankruptcy;" provided the person so dealing with the bankrupt, or at whose suit such execution or attachment shall have issued, had no notice of the prior act of bankruptcy. See statute quoted in note, 38 Eng. Com. Law, Rep. 134.

The Code de Commerce of France enacts, art. 441. "*L'ouverture de la faillite est declarée par le tribunal de commerce, son époque est fixée, soit par la retraite du débiteur, &c.*

Art. 442. "*Le failli, à compter du jour de la faillite, est dessaisi de plein droit, de l'administration de tous ses biens.*"

Art. 443. "*Nul ne peut acquérir privilège ni hypothèques, sur les biens du failli, dans les dix jours qui précèdent l'ouverture de la faillite.*"

Under the first bankrupt law of the United States, the provisions of the English law were adopted. The assignment made by the commissioners to the assignee of the bankrupt's estate, "shall be good at law and in equity, against the bankrupt and all persons claiming under him *by any act done at the time, or after he shall*

have committed the act of bankruptcy;" provided, that *bona fide* purchases by persons having no notice of the commission of the act, shall not be invalidated. Acts of 1800, ch. 19, sect. 10.

The provisions of the law of Louisiana are too familiar to justify their being quoted at length. Suffice it to say, that a judicial stay of proceedings was granted by the judge, as the first step in the *cessio bonorum*, under the Spanish jurisprudence, whence our own is derived. *Elmes* v. *Estevan*, 1 Mart. 193. That the same formality was directed to be observed by the Code of 1808, p. 294, art. 172; by the act of 1817; and by the Civil Code of 1825, art. 2172. The petition of the debtor imports a surrender of property, which the act of 1826 directs the judge to accept for the benefit of the creditors, and all subsequent attachments, seizures and levies are expressly forbidden. The date of the cession, when the surrender is voluntary, and of the petition of the creditors, in the few cases of involuntary bankruptcy, is definitely fixed as the period when the power of the debtor over his estate ceases, and that of the creditors begins.

The first and most striking suggestion, presented by the quotations which we have made from these laws, is that in no one of them is the point of time, at which the debtor ceases and the assignee begins to be the owner of the property of the bankrupt, left to inference or argument. In all of these systems, that date has been fixed by positive and express enactment. Indeed, there is no single feature of the bankrupt law of greater importance; none so apt, if left uncertain, to give rise to litigation, and to unsettle the titles to property and estates.

Now in the construction of a law, other laws in *pari materia* are properly consulted. "What is clear in one statute, may be called in aid to explain what is doubtful in another." Civ. Code, art. 17. This rule must generally refer to acts of the same legislature, for the will of one legislature may be better inferred from its own acts, than from the acts of other legislatures. Yet if the laws of two countries, on the same subject, appear, from their points of resemblance, to have had a common origin—to have been founded on institutions, habits and wants of a similar character, each code forms for the other, a valuable and legitimate source of argument and authority. But in their comparison, we must take care not to confound them, or to adopt for one country the will of the legislature

of another country. If particular provisions of the two laws coincide, the clear expressions of the one code, may be cited to illustrate the *doubtful* terms of the other. But if, from the comparison, a contrast results, instead of a resemblance—if the language of our law be clear, but in direct opposition to the corresponding provision of the statute cited for illustration, what are we to conclude, save that the foreign system has been examined and rejected, and that our legislature has willed that the law shall be different from it elsewhere? A reference to foreign statutes, with any other view, is inadmissible. To argue that a positive provision of our law can be controlled, by showing that it differs from other laws, is to maintain that the will of a foreign legislature is superior to the power of our own. The argument degenerates into paradox, and assumes that the law is different from what the legislature that made it, intended it should be. Yet the counsel contends, that the policy and language of the law of England and of the law of Louisiana support his doctrine, and, therefore, that the law of Congress upon the same subject, must necessarily be the same. If the argument be not striking from its force, it is certainly remarkable for its novelty.

The counsel quoted at large the provisions of the third section, yet he did not favor us with any comment upon the expressions used "*from the time of the decree*," &c. He treats the question at issue, as one depending solely upon deductions from the spirit and intent of the law, and of other laws; and in his eagerness thus to infer a rule, he has overlooked the rule expressly prescribed by the law itself.

The omission of Congress to fix a date at which the bankrupt law should affect the property of the bankrupt, would have evinced the most culpable disregard of the public welfare, which it is supposed to be the object of all laws to promote. If such an extraordinary omission had occurred, perhaps it would have been the duty of the courts, at all events they would have found it necessary, to fix the date which the law had failed to prescribe. Other systems would then be referred to, their provisions would be compared, and the will of the legislature would be supposed to approve the period adopted by that system offering the most numerous points of coincidence with our own. But no such

omission can be imputed to Congress. The bankrupt law has fixed the date of its own operation. That it differs from the date prescribed by other laws, only shows more clearly the intention to adopt a different rule. The will of our legislature is placed in more prominent contrast with the will of other legislatures, and other systems must be cited to show, not what has been adopted, but what was rejected.

We find, accordingly, that the English law expressly refers the operation of the bankruptcy, and the powers of the assignee, to the commission of an act of bankruptcy. That the law of France divests the debtor, from the day of the failure. That the bankrupt act of the United States, passed in 1800, re-enacted in terms the provision of the English law; that the law of Louisiana vests the property in the creditors, from the moment of filing the petition; and that the law of Congress, in terms equally explicit, vests the property in the assignee, from the date of the decree.

Each system has its rule. Which is the most conducive to the public welfare—which is best adapted to ensure a just and equal distribution of the property, are questions of legislative and political economy, which it would be worse than idle to discuss in a judicial proceeding before this court. The law having prescribed a rule, that rule must be obeyed, although the court should be of opinion that a better one might have been adopted.

The argument of the opposite counsel begins with the assumption, "that when the bankrupt files his petition and schedule, he surrenders his property to the court, which *by law* is made the administrator of the debtor's effects, for the benefit of all his creditors; and that the property and rights of property surrendered, become by operation of law divested out of the bankrupt, and pass from the hands of the court into those of the assignee." In the consideration of questions arising under the late bankrupt act, we should be careful not to suffer our familiarity with other systems to mislead us, or to withdraw our attention from the actual provisions of the law itself. It is difficult to divert the mind from its accustomed bias, and to conduct its impressions into a new channel. The theory of the bankrupt laws of England and of Louisiana, have been so deeply impressed upon our minds, that we are led almost unconsciously to consider the doctrine of rela-

tion, borrowed from the one system, and the stay of proceedings and the *concurso* of *all* the creditors, peculiar to the other, as forming a necessary and indispensable part of every system of bankruptcy. This caution is of the greatest importance. No stronger illustration of its necessity could be given, than the quotation of the paragraph from the argument on the other side.

In reading it, one would necessarily suppose that the counsel was stating the law of Louisiana, and not the law of the United States. Applied to the latter, it begs the question. It begins where the argument should have ended; and every proposition in the quotation is unfounded and erroneous. The filing of a petition in bankruptcy is not a surrender of property. The court is not by law the administrator of the debtor's estate; nor does the estate pass from the hands of the court, to those of the assignee.

The filing of the petition is not a surrender of property. The most attentive examination of the first section of the act, and of the form of the petition, prescribed by the Supreme Court of the United States, will furnish no ground for such an idea. The petition does not purport to be a surrender. It is not treated as such by the law, or by the court. It is simply a confession of insolvency, and a prayer for a decree and discharge. It implies an *offer* to surrender the property; for the divesting of the property of the petitioner, is the consequence of the decree which he solicits. The most ingenious construction can make it no more. But the difference between an offer to surrender, and an actual surrender, is sufficiently obvious. It may well be questioned whether this offer be irrevocable. There is nothing in the law which forbids the petitioner from retracting it. Before the decree, his circumstances may change, or he may conclude that they do not require the interposition of the law, and discontinue his prayer for the relief he no longer desires. His debts may be of such a character as to exclude him from the benefit of the law; and his creditors, cited for that end, may appear and show cause why the decree should not be granted. So far then from being a final and irrevocable surrender, the petition is but an offer to surrender, which may be withdrawn by the petitioner, resisted by the creditors, or refused by the court.

The court is not by law the administrator of the bankrupt's

effects. We have seen the fallacy of supposing that the property is vested in the court, either in form or substance, by filing the petition; and the court cannot administer that of which it has not possession or control. Nor does the law provide any mode of temporary administration.

The commissioners under the English law and under the bankrupt act of 1800, took immediate possession of the bankrupt's estate, and held it until the appointment of assignees. In Louisiana the judge accepted the cession, and appointed, if necessary, provisional syndics. In France the seals are affixed to the debtor's effects, and commissioners and agents are named by the decree opening the failure. Code de Commerce, arts. 449, 454. No corresponding provisions are found in the act of Congress. If it was intended that the property should be divested from the filing of the petition, the omission to provide some guardian for the estate, until the appointment of an assignee, would have been most remarkable. The absence of any such provision, corroborates the opinion that the property remains in the debtor until the decree.

If, then, the property never vests in the court, we may safely conclude, that it does not pass from the hands of the court into those of the assignee. It passes at once from the debtor to the assignee. The decree, which divests the one of his estate, invests the other, and makes the assignee, like the heir of the ancestor, the legal representative of the bankrupt.

The position assumed by the counsel leads to another anomaly. The court is not empowered itself to administer the property and protect the rights, either of creditors or of the debtor, during the interval between the petition and the decree, or to appoint an agent for that purpose. But, says the counsel, the bankrupt is divested by filing his petition. It follows, then, that there is an interval, during which the property has no owner and no administrator, and suits can neither be prosecuted nor defended. Such a result is contrary to the whole policy of our laws. Accident sometimes leads to delay in the qualification of an administrator, or the appearance of a new party to a suit; but no legislature ever enacted, that there should be, in the ownership of estates, or in the progress of judicial proceedings, a necessary and unavoidable *hiatus*.

But the argument which seems to have had the greatest weight

with the court, is drawn from the supposed policy of the bankrupt law. It is said that the great object of the law is to secure a *pro rata* distribution of the property of the debtor among his creditors; and that this object may be defeated by leaving the debtor in full control, and permitting the prosecution of suits, after filing of the petition. It is feared that creditors might suffer by the frauds of the debtor, and that suits, by collusion, or in the usual scramble for preferences, being prosecuted to execution, the property, the pledge of all the creditors, might be engrossed by a few. It is even suggested, that the description of property in the schedule would point it out for seizure, and assist in defeating that equitable distribution which the law intended to secure.

These objections appear very formidable, but we think a little reflection will diminish their importance. The first step in the proceeding, is the presentment, under oath, of a statement of the property and debts of the bankrupt. The creditors are cited to a public investigation of his affairs. The least violation of the law deprives him of the relief which he asks from the court; and his conviction of falsehood consigns him to a prison and to disgrace. Fraud, at such a time, need not be apprehended. The dishonest debtor, seeking to defraud his creditors, would scarcely await the filing of his petition, to accomplish his purpose. He would be more inclined to execute his fraud, and to allow such time to elapse as would cover it with the mantle of oblivion, before making his application, than to select for its perpetration, that period, of all others, the most unpropitious of success and impunity. Nor can it fail to strike the court, that the stay of proceedings itself would be a cover for fraud, and afford the greatest facility for its perpetration. The legislature of Louisiana, impressed with this fact, provided various modes of protecting the interests of creditors, by the appointment of provisional syndics in some cases, and the imprisonment of the debtor, or the sequestration of his estate, in others. But in the act of Congress we find no such precautions against the frauds, to which a stay of proceedings would tempt the dishonest.

It is true that, in the interval between the petition and the decree, some of the creditors may press their suits to execution, and obtain a preference over the rest. If this preference be acquired

by fraud or collusion, the law condemns it, and the assignee is authorized to have it set aside. If, on the other hand, it results from the regular course of judicial proceedings, we cannot perceive any reason why the creditor should be deprived of the reward of his vigilance. A levy, on the day before the filing of the petition, would certainly secure a lien. Would it be any more unjust or unreasonable, to grant the same lien to a levy made on the day after the filing of the petition? In both cases the gain of the seizing creditor is the loss of others; he is paid at the expense of the mass. In every case of *insolvency*, the creditor who forces payment by execution, is paid at the expense of other creditors—he diminishes the fund, from which they are to expect payment. As a matter of abstract justice and equality, the period of insolvency would then seem to be the point, at which preferences should cease to be acquired by legal pursuit; but that period is too vague and indefinite—too difficult of proof, and too fluctuating, to furnish a safe or salutary rule. Such a principle would throw open the doors of litigation and doubt so wide, that no man could rest secure upon his judicial rights. No system, with which we are acquainted, has attempted to adopt it.

The general policy of the law, is to encourage the competition of creditors; the most vigilant obtain the highest favor. But bankrupt laws are an exception to the principle. They prescribe a period when the race of vigilance shall cease. To say that this period should be fixed by the courts, upon considerations of equality and justice, would only be to leave it uncertain. To be definite, it must be fixed by arbitrary power. The legislature, in the exercise of its peculiar duties, having weighed all the considerations of policy applicable to the subject, must prescribe a rule. When prescribed, it governs the courts, like any other arbitrary act of the superior power.

This evil of occasional preferences, acquired by vigilance, is, however, more imposing in theory than in practice. It is only in a few large cities, that legal process is so summary, as to afford facilities for its occurrence. Throughout the country generally, the process is too slow; the delay between citation and trial—between judgment and execution, is too great, to give room for many, or important changes, in the rights of creditors, in the short

interval between the petition and the decree. Congress may well have regarded such occasional preferences, as a less evil, than the increase and complication of the machinery of the court, necessary to prevent it. In the attempt to establish a system both cheap and simple, some minor considerations would necessarily be sacrificed.

In England, bankruptcy was regarded as a crime. The forfeiture of the property was a punishment of the offence. As treason operated a forfeiture to the king, from the moment of its perpetration, so the estate of the bankrupt was forfeited to his creditors, from the commission of an act of bankruptcy. The suing out of a commission, was likened to the interdiction of a prodigal or a madman. It was the action and execution at once. (Bacon's Abridgment, *verbo* Bankrupt)—the *execution paré* of the common law. But this system has been greatly modified. A bankrupt is no longer treated as a malefactor. A debtor, desirous of surrendering his property, is no longer compelled, though innocent, to assume the demeanor of the criminal—to keep his house—to depart the realm—to lie in prison—in order that the most friendly of his creditors, may sue out his commission. By the act of 6 Geo. 4, sec. 6, he is permitted to make his declaration of insolvency, before the chancellor's secretary in bankruptcy, and thus openly solicit the interposition of the law.

So the doctrine of relation, originally a stern and unbending rule, annulling all transactions after the commission of the act, was from time to time relaxed. The extreme hardship and injustice sometimes resulting from its enforcement, led to the enactment of many and important exceptions, (Eden, 259,) until at last, by the statute 2 and 3 Vict., all transactions, payments, and seizures under execution, are protected, unless the party benefited thereby had actual notice of an act of bankruptcy.

The government of the United States once adopted the original system of Great Britain, but abandoned it, after a short trial. In resuming the consideration of the subject, forty years afterwards, it would have been indeed unwise in our legislators, to have rejected the improvements which had intervened in the system, and to have re-enacted it, with all its obsolete and discarded errors. Congress did not fall into so lamentable a mistake. They endeavored

to improve upon the system *now in force* in England, and to adopt one more simple, more expeditious, and more liberal. The law which resulted from their deliberations, is in many respects imperfect. It could not have been otherwise. A system of such great importance, could not, by a single effort, be brought to perfection; but the desire to abandon the errors of other systems, while their best features were preserved, was, no doubt, the prevailing spirit in the formation of the law.

The declaration of insolvency, is still the only step which the debtor can take, under the English law. The creditors alone can prosecute the fiat or commission. Congress went still farther. It authorized the debtor, not only to initiate the proceedings, but to prosecute them to the surrender of his property, and to his own discharge. So, instead of reviving the doctrine of relation, almost abandoned where it originated, Congress discarded it altogether, and fixed upon the date of the decree as a more definite and notorious point, from which the powers of the assignee over the estate of the bankrupt should commence. At the same time, the rights of creditors were protected, by stamping with nullity every act in contravention of the law, and by giving to the assignee full power to recover any advantage, *illegally* obtained.

We infer then, from what is enacted by the law, and from all that it has failed to enact, that until the decree, there is no change in the title to the bankrupt's estate, or in his right to administer and protect it; and, consequently, that the filing of the petition is not a reason for a stay of judicial proceedings.

The stay of proceedings under the law of Louisiana, was a consequence of the *concurso of all the creditors*, an institution, with its name, derived from the Spanish jurisprudence. As all creditors, without exception, were brought into the bankruptcy, there was no occasion for separate proceedings. For the same reason, it was a part of the theory of the law that the bankrupt, from the moment of his cession, was *civiliter mortuus*. *Elmes* v. *Estevan*, 1 Mart. 193. *David* v. *Hearn*, Ib. 207. The control of the syndic extended over all the property of the debtor, without regard to the liens, pledges, mortgages, or privileges affecting it. The law did not profess to annul these preferences, but it altered the remedy upon them. The execution of writs, issued even on final judg-

ment, was superseded. The syndic took from the hands of the sheriff, property seized under execution, and became himself the executive officer of the law in selling it. *Bermudez's Syndics* v. *Ibanez*, 3 Mart. 39. Civ. Code, art. 2180. Act of 1826. After the sale of the *entire* property, the proceeds were distributed to those having liens and privileges, in their respective ranks, and then to the ordinary creditors. The tableau of the syndic, therefore, embraced the whole range of liens, privileges and mortgages, conventional, tacit and legal, that abound in our laws.

But the whole of this system is unknown to the English law. Judicial process, there, is never interrupted.

"Although all acts in relation to his property, done by a bankrupt after an act of bankruptcy, *may be avoided* by the assignees, subject to certain exceptions by express statute, yet the bankrupt is still capable of maintaining actions, and no one can take advantage against him, by plea of his bankruptcy, before the commission and assignment under it; the legal property remaining, till actual assignment, in the bankrupt himself. Cullen, 412.

Even after the issuing of the commission, although the property of the debtor is thereby withdrawn from new pursuit by legal process, the creditor is "still at liberty (until the discharge,) either to come in and take a proportionable benefit, under the commission, or to proceed against the person of the bankrupt, in the ordinary course of law." Cullen, 148.

The discharge itself does not operate as a stay. The mandate of the judge in the *cessio bonorum*, was binding upon the courts and creditors, without a plea—a judgment, rendered in violation of it, was a mere nullity; while the discharge of the bankrupt, in England, can only avail him by *plea or motion*. Cullen, 399. Its operation is not to supersede legal process, but to confer on the bankrupt a new means of defence, which he can plead in bar, and which secures a judgment in his favor. If a creditor in England has a mortgage, a pledge, or a lien, or if he has made a seizure under execution, the bankrupt law does not interfere with his rights. It leaves him to his possession, or permits the sheriff to proceed with the sale, and to pay over the money *to the plaintiff*. The assignee has no power to disturb the possession, either of the creditor or of the officer. He is only authorized to *redeem* the pro-

perty, by paying the amount of the lien, or by a performance of the condition, on which the right to the possession depends. Eden, 286, 290, 294. Cullen, 209. "He takes the property, in the same condition and subject to the same burthens, as the bankrupt himself had it." Cullen, 185. Hence the jurisdiction of the bankrupt courts is limited to the superintendence and control of *matters in bankruptcy*, and to controversies with, or between creditors, *who come into the bankruptcy*. 3 Chitty's Gen. Prac. 543.

Creditors having securities may keep out of the court. They have the choice of tribunals. They may proceed in the ordinary courts, or, if they ask the assistance of the bankrupt court, it will be given them. Eden, 451–2. 38 Eng. Com. Law Rep. 582. They discuss the property, affected by their peculiar claims, not in a *concurso*, but in their own suit. If it is more than sufficient to pay them, the assignee receives the excess; if less than their claims, they then go into the bankruptcy as ordinary creditors, for their *pro rata* upon the balance. Proof in bankruptcy is a technical proceeding, involving a submission to the jurisdiction of the bankrupt court, a release of all right to preference, and a consent to a *pro rata* dividend. Cullen, 145. Hence the English assignee is the agent, and English bankruptcy is the *concurso*, not of *all* the creditors, but of the chirography creditors alone.

Now the two systems—that of Louisiana, and that of England, are not only unlike, but in these important particulars are diametrically opposed. Which of the two was adopted as the model of the bankrupt law of the United States? A Congress, composed of the representatives of twenty-six states, all, save one, governed by the common law of England, and familiar only with the English jurisprudence, would naturally prefer the system with which it was best acquainted. The English system was, beyond all doubt, the model of our own. The act of Congress is but an abridgment of its provisions, with such changes and omissions, as were deemed necessary to accommodate it to the greater freedom and liberality of our institutions. An extension of the right of voluntary bankruptcy, a further restriction of the doctrine of relation, and a greater facility in obtaining a discharge, are the most prominent changes in the principles of the law. The court has observed, that the bankrupt law of the United States assimilates in a great degree, to

the law of Louisiana. In certain points, all bankrupt laws must necessarily bear a resemblance to each other. The appointment of an administrator of the property of the bankrupt, the distribution among the creditors, and the release of the debtor, either partial or entire, are of the essence of all bankrupt laws. But take out these points of resemblance, and look through the details of the respective laws—the powers of the assignee—the rights of particular creditors—the extent of bankruptcy jurisdiction, and the cumulation of suits, and we find, instead of resemblance, the most striking and pointed contrast. On the other hand, compare the law of Congress, in all these particulars, with the English law, and we observe a coincidence, as marked as the contrast exhibited by the first comparison.

There is certainly no provision in the act of Congress for a judicial mandate, staying proceedings either against the debtor or his property. How far the proceedings, from their character, operate as a supersedeas, will be seen by a short review of some portions of the law.

The *concurso* in bankruptcy, does not embrace *all* the creditors. The law distinctly recognizes two classes of creditors, viz: those who claim under the bankruptcy, and *those who do not claim under the bankruptcy*. Over the latter, the law assumes no control. If they are ordinary creditors, they lose their dividend, by neglecting to make their claims; if they have securities, they are left to the exercise of the legal rights resulting from such securities, without being forced to come into the bankruptcy.

Although the general provisions of the law could not fairly have been held to destroy any securities, lawfully acquired before the bankruptcy, the law, from abundant caution, has made express reservation of such rights. The description of the rights so protected, is given in the most comprehensive terms. "The lawful rights of married women or minors, or any liens, mortgages, or other securities on property, real or personal, which may be valid by the laws of the States respectively," (sec. 2,) fairly embrace every right to a preference, known even to the laws of Louisiana. There is a qualification that such rights must not be "inconsistent with the provisions of the second and fifth sections;" and, it is sometimes contended, but without reason, that this reservation destroys

the proviso, to which it is appended. The only securities inconsistent with the provisions of the second section, are those given by the bankrupt, "in contemplation of bankruptcy," by way of preference to creditors, or fraudulently to persons other than "creditors and *bona fide* purchasers "without notice." All securities, so conferred, are declared to be a fraud upon the law and void; the assignee is authorized to have them set aside; and, of course, they do not come under the protection of the proviso. Let us now see what securities are inconsistent with the provisions of the fifth section.

That section declares, that "all creditors *coming in and proving their debts*, under the bankruptcy," shall share in the bankrupt's estate "*pro rata*, and without any priority or preference whatever," except only for debts due to the United States, to certain sureties, and to laborers. It further enacts, "that no creditor, *coming in and proving his debt*, shall be allowed to maintain any suit, at law or in equity, therefor, but shall be deemed thereby to have *waived* all right of action and suit *against such bankrupt*; and all proceedings already commenced, and all unsatisfied judgments, already obtained thereon, shall be deemed to be *surrendered thereby*."

Thus it would seem, that by securities not inconsistent with the provisions of the fifth section, are meant *those which shall not have been proved in bankruptcy*. The proviso of the second section protects them, unless, being *waived* by proof, their further existence, *as preferences*, becomes inconsistent with the *prorata* distribution to all *who have proved their debts*.

If, then, a creditor, holding a security, values the protection offered to him by this proviso, he must keep out of the bankruptcy. If he "*comes in and proves his claim*," he does an act inconsistent with, and destructive of his right to a preference. The loss of the preference is, in that case, not the result of the law, but the voluntary act of the creditor, duly and fairly admonished by the law of the consequences of the act. If he prefers his dividend to his pledge, to his mortgage, or to his right of action, the law throws no impediment in the way of his free selection. "He can claim under the bankruptcy *or* against it, but he cannot do both, at the same time." Cranch, J. The law prescribes no

mode of proof, by creditors holding securities; no form of reservation, by which, when proving, they may secure their preference. It contains no instructions for a classification of debts, giving to one creditor the proceeds of this property—to another, the proceeds of other property—recognizing this creditor as entitled to a general, and that to a special privilege. With the few exceptions already named, all *who prove*, are paid *pro rata*; and the very form of division dwindles, from the complication and ceremony of a tableau of distribution, to the simple declaration of a dividend.

The securities in question, though protected by the law, are not available in the bankruptcy. By bringing them into the bankruptcy, all right of action is *waived*, and all proceedings and unsatisfied judgments *surrendered*. Does it not follow, that if a creditor will not *waive* his right of action against the bankrupt, the right still exists? If it were destroyed by the mere filing of the petition in bankruptcy, no right would rest in the creditor, to be afterwards *waived* by him. Does it not follow, that the proceedings at law, by which alone mortgages, liens and privileges can be enforced, remain within the reach of the creditor, unless he consents to surrender them? If these proceedings, the sole remedies upon such securities, are destroyed by the transfer of the bankrupt's rights to the assignee, what means the solemn farce of enacting *how* the right to them, no longer in existence, may be *surrendered?*

If, then, the law intends that these rights shall not, by its provisions, "be annulled, destroyed, or impaired," and, if they cannot be enforced in bankruptcy, it follows, necessarily, that they must be asserted in the ordinary tribunals. So far from impairing them, the law does not interfere with them. The remedy upon them remains the same; the form of action is unaltered, save that the claims asserted before the decree, against the bankrupt, must, after the decree, be ascertained and enforced, contradictorily with the assignee. Hence the assignee is empowered to sue and defend, like the bankrupt; to succeed him in all suits, pending at the date of the decree; and to prosecute and defend, in the same manner, as the bankrupt might have done before his bankruptcy. He is not confined to the court of bankruptcy; but under these broad expressions, every court of ordinary jurisdic-

tion is open to him, as plaintiff; and every such court, whose process can be served upon him, may exercise jurisdiction over him, as defendant, and bind him by its decrees. His position is more consistent than that of a syndic under the laws of this State, who is the representative and agent of conflicting interests and parties. Representing only the creditors who come into the bankruptcy, and specially charged with the protection of their rights, he contests, in all courts, the claims of creditors who do not come in, and who seek to diminish the assets of the bankruptcy.

The very organization of the bankrupt court, adds force to the position contended for. The sixth section, which confers the jurisdiction, limits it to "matters and proceedings in bankruptcy." In further defining this jurisdiction, it is said to extend to all "*controversies in bankruptcy*," between the bankrupt and creditors who shall *claim* any debt or demand, "*under the bankruptcy*," between "*such creditors*" and the assignee, and between the bankrupt and the assignee. The law gives no further jurisdiction, except that conferred by the eighth section concurrently on the District and Circuit Courts, over suits at law and in equity, between the assignee and "persons claiming an adverse interest, touching any property or rights of property, transferable to or vested in such assignee." With this exception, the jurisdiction is limited as strictly to bankrupt proceedings, as that of courts of probate to mortuary proceedings. But every suit against an executor is not a mortuary proceeding; nor is every suit against a bankrupt or an assignee, necessarily a proceeding in bankruptcy. The neglect, then, to provide for the transfer of all suits against the bankrupt to one tribunal, and for their cumulation in a single proceeding, was not the result of casual omission. Legislators, educated under a system of laws whose forms contain no analogous proceeding, would have listened with surprise to any proposal that such a cumulation should form a feature of the law.

It is sometimes said, that the bankrupt's property cannot be pursued elsewhere than in the bankrupt court, because all his property and rights of property are by law *vested* in the assignee. The estate vests in the assignee, as it vested in the bankrupt. He succeeds to the same rights, and enjoys by the same title; but he has no higher rights. If the property, before the bankruptcy,

was subject to liens or privileges, it was vested in the bankrupt subject to such liens and privileges, and it vests in the assignee under precisely the same burden. If, before obtaining possession, the bankrupt would have been obliged to redeem or discharge the pledge, so must the assignee, before he can acquire the possession; and the law provides for the contingency, by directing that the assignee may, under the revision of the court, redeem the property from such incumbrance. Sec. 11.

Considering then the language of the law, its apparent intent and policy, its analogies and contrasts with other systems, we are led to the conclusion, that Congress intended that there should be no stay of proceedings, no cumulation of suits, no *concurso* of all creditors, and no divesting of property (even by relation) before the time of the decree. The law makes no distinction, in these particulars, between voluntary and involuntary bankruptcy. In the latter class, the folly of suspending judicial process, would be flagrant. Such suspense would afford the debtor the best opportunity of withdrawing his person and property from the reach of the court.

With respect to the personal rights of the bankrupt, and his capacity to stand in judgment, we have already seen that the law does not interfere with them. Indeed, the argument of the counsel destroys his case. If the capacity of standing in judgment, was lost to the bankrupt by filing his petition, by what right is he prosecuting an appeal before this court? The court might well inquire of him, in the language of the judge of one of our lower courts, when a similar position was taken—If you cannot appear in court, what are you doing here? The counsel, probably perceiving that his position embarrassed his argument, obtained an order that the assignee should be made a party to the suit; but he has not been made a party, nor has he appeared. The counsel conducted his case in the same right after, as before this order. When the bankrupt shall have obtained his discharge, he may plead it in bar to the suit; but there is nothing in the law giving him the right to plead his *petition*, or even his *decree*, in bar or in abatement. So it has been decided by Judge Cranch, on the application of a bankrupt to be released from imprisonment for debt, after his decree, but before his discharge.

The plaintiff claims to have acquired a lien upon the credits attached in this case. It is not pretended that he has waived his lien, or surrendered his action, by going into the bankruptcy. The law does not require, nor even permit, the cumulation of his suit with the proceedings in bankruptcy; he then remains free to claim a judgment against the defendant until his discharge; and free to prosecute his suit against the property attached in the case, until the assignee shall appear and show, that the attachment was illegal or void. We do not pretend that the judgment in this case would be binding upon the assignee, if his appointment should have been made before the judgment; but it is not an unusual proceeding, for a plaintiff to prosecute his suit against one party in interest to final judgment, leaving other parties interested to protect their interests in some other form. Whatever lien was acquired by the levy—whether inchoate or complete—that lien still exists. The assignee succeeding to the rights of the bankrupt, and to his rights only, cannot claim the property, without relieving it from the lien. If he shall think proper to appear, and if he can satisfy the court that the lien was inchoate only, and that the bankruptcy of the defendant prevented its being perfected; or, if he can show that the levy was made by collusion with the defendant, and in fraud of the law, then the court will decree the property to him, instead of the plaintiff. But he is the only person who can present such issues for the determination of the court, and any decision upon them before they are properly presented, would be premature. It is sufficient for the plaintiff to maintain, that the judgment from which the defendant has appealed, is correct.

Garland, J. This case is before us, on an application for a rehearing. We have carefully re-considered our judgment, and see no sufficient reasons to change it. The application for a re-hearing is, therefore, refused; but in coming to this conclusion, we do not intend to intimate any opinion, as to what may be the effect of the bankrupt law passed by Congress, upon the proceedings in the State courts, when a mortgage or lien is attempted to be enforced on property in the possession of the bankrupt, before or after the appointment of the assignee.

Nolé *v.* Charles de St. Romes and wife.

Where a slave ordered to be emancipated by will, sues to establish her right to freedom, she must allege and prove that she is thirty years of age, or a native of the State, and that she has behaved well during the four preceding years. Act 9 March, 1807. C. C. art. 185. The act of 31st January, 1827, effected no other change in the law than to authorize, under certain circumstances, emancipation before the thirtieth year.

Appeal from the District Court of the First District, *Buchanan*, J.

David, for the appellant.

Canon, for the defendants.

Martin, J. The plaintiff, for herself and her two children, claims emancipation under the will of their former owner, whose testamentary executor and heir the defendants are. She also claims damages. The answer resists the claim on the ground, that in order to obtain the consent of the police jury to her emancipation, they (defendants) must allege that she has behaved well during the four preceding years, and that she is able to provide for her maintainance, which they cannot do. It is also represented, that the children are not thirty years of age. There was judgment for the defendants, but the rights of the children to emancipation were reserved to them, the court being of opinion that the plaintiff, especially during the four years preceding her application, had been of a bad reputation, thievish, and insolent. According to the first legislation of this State in regard to emancipation, slaves of thirty years of age are alone permitted to be emancipated. Act of 9th of March, 1807. This provision is repeated in the Civil Code, art. 185. By an act of the 31st of January, 1827, slaves, under the above age, natives of this State, may be emancipated with the consent of the police jury of the parish. The petition does not allege that the plaintiff is of the age of thirty, or a native of this State; she does not, therefore, show that she may be legally emancipated. Both the act of 1807, and the Code, require an allegation and proof of the good behavior of the slave, during the four preceding years. The act of 1827 does not dispense with this, but only authorizes the emancipation before the thirtieth year.

The petition, therefore, does not present a case in which a legal emancipation can be decreed. As to the children, the record does not inform us whether their emancipation is claimed under the act of 1807 and the Code, as being thirty years of age, or under the act of 1827, as being natives of this State. The District Court reserved their rights, and this is all they could expect. The testimony shows, independently of this, that the mother's behavior during the four years preceding her application, would alone have prevented her emancipation.

Judgment affirmed.

The President and Directors of the Union Bank of Maryland *v.* Theophilus Freeman.

Under the act of Congress of 26th May, 1790, an act of the legislature of another State can only be authenticated by affixing the seal of the State thereto.

A copy of an act of the legislature of another State, certified to have been made "from *Liber*, I. G., one of the law records of the State, belonging to the office of the Court of Appeals," is inadmissible. A copy from the original deposited among the archives of the State, would be better evidence.

Appeal from the Commercial Court of New Orleans, *Watts*, J.

Martin, J. The defendant and appellant asks for the reversal of the judgment and for one of nonsuit, and has placed the case before us on a bill of exceptions taken to the admission of a copy of the plaintiffs' act of incorporation. The document offered in evidence purports to be a copy of the act of the legislature of the State of Maryland, incorporating the plaintiffs; and its admission was opposed on the grounds, that it was not authenticated according to the act of Congress; that the certificate of the clerk of the Court of Appeals, and of the presiding judge thereof, offered no legal evidence of its being a copy; that the document purports, on its face, to be only the copy of a copy; and that a copy of the original, given by the officer in possession of it, could alone afford legal evidence.

The defendant, in his answer, had expressly denied the plaintiffs' right to sue as a corporate body. They were, therefore,

bound to produce their act of incorporation. The act of Congress of 1790, chap. 38, has an express provision directing the mode in which the public acts, records, and judicial proceedings in each State, shall be authenticated, &c. The plaintiffs' act of incorporation is an act of the legislature of the State of Maryland, not a record of a judicial proceeding in any court of that State.

The act of Congress provides "that the acts of the legislatures of the several States shall be authenticated by having the seal of their respective States affixed thereto." The plaintiffs produced a copy of their act of incorporation, which the clerk of the Court of Appeals for the western shore of Maryland, has certified to be a full and true copy of the act of the General Assembly of Maryland, of which it purports to be a copy, as taken from *Liber*, I. G., No. 4, folio 578, &c., one of the law records of the State of Maryland, belonging to the office of the Court of Appeals for the western shore of said State. The certificate is attested by the signature of the clerk, and the seal of the court is affixed thereto. It is accompanied by the certificate of the presiding judge, attesting the capacity of the clerk, and that his certificate is in due form. The clerk's and the judge's certificates would authenticate the document to which they are affixed, if it were the copy of a judicial proceeding. As the copy of an act of the legislature, it lacks the seal of the State, which the act of Congress has made an essential requisite. The document was certainly inadmissible, under the act of Congress. Under the general principle which requires, that the best evidence of which the case is susceptible shall be produced, the objection to its admission was equally strong. The copy does not purport to have been made from the original act, but from a copy thereof, entered in a book belonging to the Court of Appeals, for the western shore of Maryland. It is, therefore, clear that a copy made from the original, deposited among the archives of the State, probably kept in the office of the Secretary of State, with the seal of the State affixed thereto, would have been better evidence. Indeed, nothing could, perhaps, dispense with the impression of the seal of the State on the document offered in evidence. The judge in our opinion erred.

It is, therefore ordered, that the judgment be annulled and reversed, and the case remanded for a new trial, with directions

to the judge, to require legal evidence of the plaintiffs' act of incorporation; the plaintiffs and appellees paying the costs of this appeal.

Mott, for the plaintiffs.

R. N. Ogden and *A. N. Ogden*, for the appellant.

FRANÇOIS JARTROUX *v.* MICHEL DEBERGUE and others.

APPEAL from the Parish Court of New Orleans, *Maurian*, J.

MARTIN, J.* The defendants are appellants from a judgment which rescinds the sale of the undivided half of four lots of ground described in the petition, and condemns them to pay fifteen hundred dollars in damages, and to refund such sums of money as they have received on account of said sale, and the notes given, or in default thereof, their amount in money.

The rescission of the sale was sought on the ground of gross fraud in the vendors, who sold property to which, it is alleged, they had no title. The case was tried by a jury, who found the fraud, and assessed the damages at fifteen hundred dollars.

It has been urged, that the judgment is for an uncertain amount, to wit, *such sums of money* as have been received by the defendants, and that the notes to be returned are not described; further, that the damages are excessive, and that judgment was improperly given against the defendants *in solido*.

The damages appear to us excessive, being more than treble the amount of conventional interest. As the plaintiff claimed a trial by jury, we have felt reluctant to interfere and reduce them to what appears reasonable and just. We prefer, by remanding the case, to give the plaintiff an opportunity to submit it to the decision of another jury. As this cannot be done without reversing the judgment, we have not examined the other objections made to the verdict and judgment appealed from.

Schmidt, for the plaintiff.

Grymes, for the appellants.

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* MORPHY, J., having been of counsel, did not sit on the trial of this case.

SAME CASE—ON A RE-HEARING.

BULLARD, J. This case is before us on a re-hearing. It appeared to us, on the first argument, that the verdict and judgment for $1500 damages, besides the reimbursement of what the plaintiff had paid, and the cancelling of his notes yet remaining unpaid, was unsupported by evidence; but instead of reforming the judgment, as we had authority to do, the case was remanded for a new trial. The appellee urges us to pronounce such judgment as we think ought to have been given below, and offers to enter a *remittitur* for the whole amount of damages.

To this course we see no objection, being of opinion that the judgment is, in other respects, supported by the law and evidence.

It is therefore ordered, that the judgment, so far as it condemns the defendants to refund the sums received by them, and to return the notes given, be affirmed with costs, and that, as it relates to the damages of $1500, it be reversed; and that the plaintiff pay the costs of the appeal.

LAURENT MILLAUDON *v.* THE NEW ORLEANS AND CARROLLTON RAIL ROAD COMPANY.

THE NEW ORLEANS AND CARROLLTON RAIL ROAD COMPANY *v.* LAURENT MILLAUDON.

The act of incorporation of a banking company provided that its capital should be divided into shares of one hundred dollars, of which five dollars should be paid at the time of subscribing for the stock, and the residue in such instalments, and at such times, as might be required by the Directors. Fifty dollars on each share were called in, and paid. A resolution, subsequently adopted by the Directors, provided, "that any stockholder who shall pay in anticipation a part, or the full amount due on the stock held by him, shall be entitled to dividends thereon in proportion to the amount so paid in." Under this resolution, a stockholder paid up the whole amount due on the stock held by him, and received dividends thereon, and loans (less, however, than the amount so advanced by him) upon the pledge of it. The Bank having gone into liquidation, required the re-payment of the loan, and refused to call

for further contributions from the other stockholders. An action was commenced by the stockholder who had paid in full against the Bank, to compel the calling in of the whole amount subscribed, or, in default thereof, or in the event of the inability of the stockholders to pay the balance due, to recover the amount paid by him beyond fifty dollars on each share, with interest on the over-payment, and to restrain the Company from exacting re-payment of the loan made to him, until the stockholders should be placed on an equality as to their payments. The Bank, thereupon, sued on the notes given for the loan. On appeal from a judgment rendered in the two actions, which had been consolidated: *Held*, That no stockholder can be liable for more than one hundred dollars on each share held by him, and that each share must lose an equal amount on the final liquidation of the Bank. That if the whole capital be sunk, those who have paid but fifty per cent will be debtors for the balance, and those who have paid in full cannot be called on for more. That if but half have been lost, the former are no further liable, but a balance will be due to the stockholder who has paid in full. That the payment of the whole amount of the shares under the resolution of the Directors, did not change the relative position of the stockholders to each other as partners, except as to the dividends, the one having merely anticipated the payment of all he could ever be called on to pay, and the others remaining liable for the balance of their subscriptions. That the payment was under the tacit condition that, if the concern proved profitable, the party so paying should receive dividends in proportion to the amount paid by him, and on the winding up of its business, after payment of the debts from the surplus profits, the whole amount so paid in; and, if not profitable, that he should lose only the same proportion, upon each share, as the other stockholders. That *quoad* the creditors of the Bank, the excess above fifty per cent so paid in is capital, liable for its debts; but that, as among the stockholders, the party who made the advance is a creditor to the extent of the surplus, and entitled to interest thereon from the time when the Bank ceased its operations. That the stockholders are liable for the whole amount of their subscriptions, and that, if any further payment beyond fifty dollars on each be necessary to the discharge of the debts of the Company, it will be the duty of the Directors to call on all the stockholders for an equal contribution; and that it would be unjust to use the amount paid by one stockholder, beyond the others, for that purpose. That the Bank having gone into liquidation, a stockholder may maintain an action against it; and that the loan, being less than the amount advanced by the borrower beyond the other stockholders, may be retained by him, unless required for his proportionate contribution towards the payment of the debts of the Company.

The property of a partnership is common, held *pro indiviso* by all the partners, responsible for the debts of the concern, and subject, after their payment, to division among the partners, according to their agreement. Each is a debtor for what he promises to bring in; and if one have brought in more than the rest, he is a creditor of the partnership for the difference, and, as between the partners, has a right of retention on the common stock for its repayment, and for any debt of the partnership for which he may be made responsible.

The liability of the stockholders in the New Orleans and Carrollton Rail Road Company under their subscriptions, is not affected by the act of 14th March, 1839, relieving the Banks from the forfeiture of their charters. If a further call upon those who have not paid in full, be necessary for the discharge of the debts of the Company, the Directors are authorized to make it.

Millaudon v. The New Orleans and Carrollton Rail Road Company ; &c.

On the third of April, 1841, Laurent Millaudon presented a petition to the Parish Court of New Orleans, alleging : That the corporation created by an act of the legislature of 9th February, 1833, under the name of the New Orleans and Carrollton Rail Road Company, was, by an act of the 1st April, 1835, invested with banking privileges, and authorized to increase its capital from three hundred thousand dollars, as fixed by the original charter, to three millions. That the additional capital, like the first, was divided into shares of one hundred dollars each, on each of which five dollars was to be paid on subscribing, and the remainder in instalments, as directed by the second section of the original act. That he is a stockholder in the Company, to the amount of two hundred and seventy-eight thousand five hundred dollars. That by the second section of the act of the 1st April, 1835, five offices of discount were established in different parts of the State, with an aggregate capital of one millon four hundred thousand dollars. That by a subsequent act, of the 1st of March, 1836, it was provided, (sect. 2,) that one-fourth of the capital of the branches should be furnished within six months from that date, and the remainder as the capital of the Bank should be paid in, but in such manner that the branches should receive one-half of their capital within sixteen months, and the residue within twenty-four months from the passage of the act ; and that it was contemplated, both by the legislature and stockholders, that the whole capital subscribed for the purpose of carrying into operation the banking privileges granted by the act of 1st April, 1835, with that subscribed in the first instance, should be paid on or before the 1st of March, 1838 ; and that it was the duty of the Directors appointed to manage the affairs of the Company to have called it in by that time. That the petitioner, and those under whom he holds such portion of his stock as was not comprised in his original subscription, with other stockholders, believing that the affairs of the Company would be conducted in conformity to the spirit of the laws by which it was created and its duties and privileges were regulated, paid up in full, previous to the 1st of March, 1838, the amount of the shares for which they had subscribed. That notwithstanding his repeated appeals to the Directors to call in the balance due on the stock, fifty per cent of the whole amount subscribed has remained un-

called for, to his great injury. That the Company, by calling in the whole of the capital, might have carried on a large business, and have realized great profits, while, by its neglect to do so, it has subjected itself to continual embarrassments and large losses, in consequence of which the stock has been greatly depreciated. That the course pursued by the Directors of the Company, has rendered it necessary to reduce the loans made to him on a pledge of his stock; and that this reduction falls with greater weight on those who have paid the whole amount of their subscriptions, as no allowance has been made for the excess of their payments over those of the other stockholders, and interest on such excess has been refused to them. That on the refusal of the Directors to call in the remaining amount due from the other stockholders, equity required that those who had paid up the whole of their subscrip tion should have been permitted either to withdraw the excess thus paid in, or to claim interest, at the rate charged by the Company on its loans, from the 1st March, 1838.

The petitioner further alleges, that he has, at different times, applied to the Company, demanding that the whole stock should be called in, and all the stockholders placed on an equal footing; that no reduction upon the loan made on his stock should be exacted from him, so long as the over-payment on his subscription should be sufficient to cover the amount of the loan, and the other stockholders be allowed to delay the payment of the balance due on their subscriptions; that, in case the remainder of the stock should not be called in, the excess paid by him should be refunded; and that the Company should pay him interest on such excess, at six per cent a year, from the 1st of March, 1838, (at which time, he alleges, it was contemplated that the whole amount subscribed for stock would have been paid in,) which interest amounted, on the 1st of March, 1841, to $29,065.

The petition concludes by praying for a judgment, ordering the whole amount of the stock subscription to be called in immediately; or in default thereof, or in the event of the inability of the stockholders to pay the balance due, directing $139,250, the excess paid by him, to be refunded; and allowing him $29,065, for interest on such excess, due on the 1st March, 1841, and restraining the Company from requiring any reduction on the loan

made to him, until all the stockholders be put on an equal footing. There was the usual prayer for general relief.

On the 30th April, 1841, the defendants answered. They pleaded a general denial, acknowledging their existence as a corporation under the acts of 1st April, 1833, 1st April, 1835, and 1st March, 1836, and the fact of Millaudon's being a stockholder, or holding stock in his name, to the amount of two thousand seven hundred and fifty shares. They aver that so far as the shares held by the petitioner have been paid in full, the payments were voluntary on his part ; that they were made under a resolution of the Board of Directors, to which Millaudon was a party, by which it was provided, that any stockholder who should pay, in anticipation, any part, or the full amount due on the stock held by him, should be entitled to a dividend thereon in proportion to the amount so paid in, provided that no dividend should be made on any instalment which should not have been paid in more than three months previous to the declaration of such dividend ; and that since such payments were made by the petitioner, he has received a dividend on the whole amount so paid in by him, whenever any dividend has been declared by the Directors, besides other benefits and advantages from such payments. It is further alleged that Millaudon has been for many years, and was anterior to such payments on his stock, a Director of the Company ; that he was cognizant of, and a party to the acts of the Board of Directors to whom the administration of the affairs of the Company was entrusted by the charter, and is bound thereby ; and that his acts as a stockholder and Director, are contrary and repugnant to the claims and demands set up in his petition. The defendants conclude with a prayer for a judgment in their favor, &c.

In a supplemental petition filed on the 27th May, 1841, Millaudon further pleads, in case the court should be of opinion that the Board of Directors were authorized to limit the calls on the stockholders under their subscriptions, to the amount already paid in, and that the stockholders were not bound to complete their subscriptions to the full amount, before 1st March, 1838, that the excess of payment made by him was made in error, and that he is entitled to reclaim the same, with interest at six per cent a year,

during the time for which the Company had the use of such over payments.

On the day on which the Company filed their answer to Millaudon's petition, they commenced an action against him, representing that he was indebted to them in the sum of $82,650, the amount of five promissory notes, executed by him, and secured by a pledge of stock of the Company, a copy of which act of pledge was annexed to their petition. Their petition prays for judgment for the amount of the notes, with interest from their maturity, at six per cent a year, with a privilege of pledge upon the stock by which the payment of the notes was secured.

In answer to this petition, Millaudon acknowledged his execution of the notes, and set up in defence the matters alleged in the petition filed in his action against the Company.

The second section of the act of 9th February, 1833, incorporating the Company for the purpose of constructing the Rail Road, declares:

"That the capital stock of said Company shall not exceed three hundred thousand dollars, divided into shares of one hundred dollars each share, and payable in such instalments, and transferable in such manner, as shall be provided by the by-laws of the Company; and that upon each and every such subscription there shall be paid at the time of subscribing, five dollars on every share so subscribed, and the residue thereof shall be paid in such instalments, and at such time, as may be required by the President and Directors of said Company;" &c.

By the act of the 1st April, 1835, which amended the charter and conferred the privilege of banking, it is provided (sect. 1,):

"That the capital stock of said Company be extended to the sum of three millions of dollars, inclusive of the sum of three hundred thousand dollars fixed by the original charter of said Company, and that such additional capital stock shall be divided into shares of one hundred dollars each, and payable in such instalments, and transferable in such manner, as shall be provided by the by-laws of said Company; and that upon each and every such subscription there shall be paid at the time of subscribing five dollars on every share so subscribed, and the residue thereof shall be paid in such instalments, upon such notice, under such penalties

and such provisions, as are set forth with regard to subscriptions to the original stock of said Company, in the second section of the original act of incorporation thereof."

A subsequent section of this act provides for the establishment of five branches, with certain capitals mentioned in the act.

By an act of the 1st March, 1836, further amending the charter, it was declared (sect. 2,):

"That one-fourth at least of the capital of the branches, shall be furnished within six months from the passage of this act, and the remainder in proportion as the capital of said Bank is paid in; *provided*, said branches shall receive half of their capital within sixteen months, and the whole within twenty-four months; and in case said branches do not yield a nett profit of six per cent per annum, then and in that case, they or either of them may be withdrawn twelve months after said branches shall have received the whole amount of their capital."

The two cases were consolidated, and tried together. It was proved, that Millaudon owned two thousand seven hundred and fifty shares of the stock of the Company, which had been paid for in full; that certain other stockholders, had paid in full; that those who have not paid in full, have paid but fifty per cent on each share; and that the last call on the stockholders for payments under their subscriptions, was made by the Board of Directors on the 19th April, 1836, to complete the fifty per cent.

The resolution of the Board of Directors, under which Millaudon paid his stock in full, was adopted on the 13th May, 1836, and is in these words:

"Resolved, that any stockholder who shall pay, in anticipation, a part, or the full amount due on the capital held by him, shall be entitled thereon to dividends in proportion to the amount respectively paid in; provided that no dividend shall be made or received in favor of any instalment, which shall not have been paid in more than three months prior to the declaration of such dividend."

Nicholson, the cashier of the Company, testified, that he was generally present at the meetings of the Directors; that the question of calling in the whole capital was often agitated before the Board; that Millaudon was always desirous of having it done; that considerable amounts of the stock of the Company had been

transmitted to Europe for sale; and that stocks not paid in full cannot be sold in the European markets. It was proved, by other evidence, that Millaudon had urged the Directors to call in the balance due on the subscriptions. The Company also, offered evidence of the dividends which had been paid to Millaudon, and to the former owners of part of the stock held by him. It was admitted that the Bank was in a state of liquidation.

The Parish Court, *Maurian*, J., gave a judgment in favor of Millaudon for $137,500, the amount paid by him above what had been required from the other stockholders, with legal interest from judicial demand (3d April, 1841,) until paid; and in favor of the Company for $82,650, the amount of the notes sued on by them, with interest at six per cent from maturity; the one sum to be deducted from the other, the difference to be the amount due to Millaudon by the Company. The latter were condemned to pay the costs, and have appealed.

T. Slidell, for the appellants. The petitioner prays that the whole stock of the Company may be immediately called in, and all the stockholders ordered to pay the fifty per cent remaining due on their subscriptions.

The first section of the charter of 1835 provides, that upon each and every subscription there shall be paid, at the time of subscribing, five dollars on every share so subscribed, and the residue thereof in such instalments, upon such notice, and under such penalties and such provisions, as are set forth with regard to subscriptions to the original stock of said company in the second section of the original act of incorporation. The second section referred to provides, that the stock shall be divided into shares of $100 each, payable in *such instalments*, and transferable in such manner, as shall be provided by the by-laws of the Company; and that upon each and every such subscription there shall be paid, at the time of subscribing, five dollars on every share, and the residue thereof, in such instalments, and at such time, *as may be required by the President and Directors of said Company*. If the above provisions, which are the only distinct and positive ones in the charter, be interpreted by themselves, it is indisputable that the calling in of the stock is left entirely to the discretion of the cor-

poration itself. The words are plain, and susceptible of but one construction.

But it is contended by Millaudon, that a contrary interpretation impliedly results from other provisions of the charter. An implication in one part of an instrument, to control a clear and distinct enunciation in another part of the same instrument, must, to say the least, be *direct, certain* and *irresistible.* The provisions of the charter upon which the counsel for Millaudon relies, are not of such a character. From the facts, that, by the second section of the act of 1835, offices of discount were established at five different places in the State, with an aggregate capital of one million four hundred thousand dollars, and that by a subsequent act of the legislature, (act of 1836, sect. 2,) it was provided that one-fourth of the capital of the branches should be furnished within six months from the passage of the act, and the remainder in proportion as the capital of the Bank shall be paid in, provided that said branches shall receive one-half of their capital within sixteen months, and the whole within twenty-four months, the conclusion is attempted to be drawn that it was in the contemplation of the legislature and of the stockholders, that the whole capital subscribed for putting into operation the banking privileges granted by the act of 1835, together with the capital originally subscribed, should be paid in full before the 1st March, 1838. Is this conclusion *direct, certain, and irresistible?*

The history of the bank charters granted by the legislature of this State shows, that when such charters have been granted to the citizens of New Orleans, the grant has been usually accompanied by provisions for the real or supposed advantage of the country parishes; and that it has been usual to exact a *bonus* for the benefit of the country parishes under different forms—sometimes in the shape of branches of discount and deposit, sometimes of loans to the country parishes or districts, sometimes in the shape of an absolute advance towards the construction of a rail road or bridge, or other improvement; and perhaps of all the charters so granted, not one contains so many onerous provisions of this nature as the charter now under consideration. These were not provisions for the benefit of stockholders, but for the benefit of the

parishes. They were stipulations *pour autrui*, both practically and in a technical sense. The very charter under consideration contains the strongest internal evidence of our position; for the second section of the act of 1835, requiring the establishment of five branches or offices of discount and deposit, contains the following clause: "*Provided*, that the capital of the aforesaid branches be called for by the several parishes entitled to the same, within three months after their establishment." So, in the third section of the same act, the legislature, apprehensive that the burden imposed on the Company might be too heavy to be borne, declared, that "the mother Bank may withdraw any of said branches after two years, if they do not yield a nett interest of five per centum per annum."

The provision in the third section of the act of 1836, is a stipulation for the benefit, real or supposed, of the country parishes, exacted by way of *bonus* from the corporation, and to be fulfilled within a specified period. Can it, then, be contended, if the Bank should find ways and means to furnish the capital to the branches, without calling in the whole of its capital, that it could not lawfully do so? Who could complain? Not the State, for the obligation of establishing the branches for the benefit of the parishes, would have been fulfilled. Not the parishes, for they would have received all that the bounty of the legislature intended they should get. Not the stockholders, for they had confided the administration of their affairs to the Board of Directors, elected by themselves, and whose members are identified in interest with them. If the capital had not been advanced to the parishes for whose benefit the stipulation was made, could they not, at the expiration of the period, by legal proceedings, have compelled the advance? This interpretation, for which we contend, makes the several parts of the charter harmonize, and does violence to none. The interpretation claimed by Millaudon requires, that an *implication*, remote in its character, and unnecessary to give effect to any part of the charter, shall repeal the clear and unequivocal enunciation of the legislative will, expressed in the plain language of the second section of the original charter, and repeated in the first section of the new charter. *Ut res magis valeat quam pereat*, is a sound principle of interpretation. Our position gives effect to the whole

law. The forced *implication* of our opponent strikes out one of its plain and reasonable provisions, and wrests from the Board of Directors, without necessity, the grant of the power of calling in the instalments at such time, and in such manner, as the wants and interests of the institution might suggest or require.

"Laws *in pari materia*, or upon the same subject matter," says the Civil Code, (art. 17,) "must be construed in reference to each other; what is *clear* in one statute, may be called to explain what is doubtful in another." Here the effort seems to be to reverse the principle, and to *invoke what is doubtful for the destruction of what is clear.*

Millaudon further prays, "that in default thereof, (i. e. of calling in the balance due on the stock,) or in case of inability of the stockholders to pay the residue of their subscription, the surplus paid by him, to wit, the sum of $139,250, may be refunded."

The minutes of the Bank show that the over-payments by Millaudon were gratuitously made, under the permission granted by the resolution of May 13th, 1836. Whether Millaudon, like others, did this for the purpose of facilitating his sales in Europe, or in the hope of frequent dividends, or for any other reason, it is certain that *he paid voluntarily, that he has received dividends on the excess of fifty per cent, and that for four or five years he has had large stock loans on the excess.* Is he to reap all these benefits from a privilege accorded by a resolution of the Board of which he was a member, and now, when adverse circumstances have reduced the value of the stock, to be permitted to recall one half of his instalments? *Qui sentit commodum, sentire debet et onus.*

The fact that Millaudon's over-payments were *voluntary*, and that he has been benefited in the shape of dividends and stock loans, will satisfy the court that the claim of interest is untenable. The interest spoken of in the 18th section of the act of 1835, relates to the old stock only; and cannot, without palpable violence to the charter, be applied to the new stock. The English text is plain, though the French text has been rendered unintelligible by careless translation.

Millaudon also demands, "that the Company be restrained from requiring any reduction on the loans made to him on a pledge of

his stock, until all the stockholders be put on an equal footing with himself."

If there be any inequality, it is the result of his own voluntary acts, with a view to his own benefit and convenience. While the Bank was prosperous, he received his dividends, and has had stock loans on the whole amount paid. He is the partner of the other stockholders. The Bank *quoad* its stockholders, is really a partnership. Millaudon voluntarily put in twice the amount contributed by his associates. While the Company prospered, he received his *pro rata* of profits; now that its situation is changed, he demands back half of what he contributed to the capital of the partnership, without the indispensable preliminary of *a liquidation of the partnership affairs*, and the payment of the partnership liabilities. The liquidation of the partnership affairs, is an indispensable preliminary to the withdrawal of his capital by any partner. "Nothing," says this court, in the case of *Faurie* v. *Millaudon*, 3 Mart. N. S. 476, "is more clear than that the acting partners are not accountable to the others, much less to a number of them, even the majority or more, for any particular transaction singly, nor any number of transactions, but only for that balance which, after a settlement of accounts, shall appear due." Again, in the same case: "A partner has no action against another, except to make him account, until a final settlement takes place, and then for the balance that appears." "A partner has no right to be paid until all claims against the partnership are discharged." If these principles be true as to ordinary partnerships, with how much greater force do they apply to an incorporated banking institution? The very amount furnished by Millaudon, by his voluntary contribution, formed an important portion of the capital, on the faith of which the Bank issued its promissory notes, and the public accepted them as a currency. This capital is the pledge of its creditors. Should the judgment which Millaudon has obtained be affirmed, he will sell the assets of the Bank, and though himself a debtor of the public *quoad* his stock, will be paid before his own creditors.

Eustis, on the same side. The first question which the case presents is: Were the Directors bound to call in the whole nominal

amount of the stock? Is any such duty or obligation imposed on them by the charter?

On the mere construction of an instrument, little can be offered to a court like this, by way of argument. Thoroughly familiar with the principles of law relating to the subject, their application is an easy task. The court, however, may derive some assistance from explanations.

It may, at first, be considered singular, had the legislature intended that the whole capital should be paid in within a given time, that it did not so provide in express terms. So far from this being the case, the second section of the original act, which provides for the capital stock, its payment, and its terms, provides for the very reverse. "The residue thereof," says this section, "shall be paid in such instalments, *and at such time*, as may be required by the President and Directors of said company." The payment of five dollars was exacted, in cash, *at the time of subscribing*; and the *period for the payment of the balance*, was left to the discretion of the Board of Directors. If this be not a positive enactment as to the time of payment, it would be difficult to make one.

Is there any thing in the charter, or in the amendments, which annuls or repeals this positive enactment as to the time of payment? It is contended that there is, and that by the second section of an act amendatory of an act amending the charter, this important and substantive provision is destroyed. It must be borne in mind, that the mode of payment, prescribed in the charter, is re-asserted and preserved, by an express enactment in the amending act.

In the first section, providing for increasing the stock, it is said, that it shall be *payable in such instalments* as may be prescribed by the by-laws of the Company.

The first charter was granted in 1833, for making the Rail Road. The additional act creating the Bank, and re-enacting the clause concerning the time of payment of the stock, was passed in 1835; and the amendatory act, containing the clause relative to furnishing capital to the branches, was enacted the year after, in 1836.

The objection to construing the provision concerning the branches as repealing this express and twice enacted fundamental clause, upon

all principles of sound construction, is well taken. The charter, amendments, and supplements, must be taken as one whole, and effect given to every part. A fundamental provision, like the one under consideration cannot be repealed by mere *implication*. The implication must be sacrificed rather than the *twice-enacted* clause.

It is clear, from all the enactments, that the furnishing of capital to the branches, was a part of the *bonus* given in lieu of a forfeiture, (which had been remitted by the previous section,) and that the attainment of this object was the intention of the second section, which provided for the payment of the capital to the branches, and did not purport to treat of, or make any change in the time fixed for the payment of the capital stock. The branches were entitled to have their capital, one-half in sixteen, and the other half in twenty-four months. But should the Bank provide the branches with capital from any other source, the payment of the capital would always be a question of administration resting in the discretion of the Directors. The terms fixed for furnishing capital to the branches can, in no sense, be considered as repealing two positive enactments, concerning another subject, to which the clause refers as a mean and not as an end.

The furnishing of capital to the branches, was not necessarily dependent on the payment of the stock in full. The capital might have been furnished from profits, or from voluntary payments on stock, like that by Millaudon. Had several of the large stockholders paid their stock in full, there would have been ample means to supply the exactions of the charter in favor of the branches, without any general call on the stockholders. The general contribution is, therefore, not indispensable, under the charter, to the attainment of the end.

But the prayer of Millaudon *is not that the capital be furnished to the branches*; and the court can in no event order the stock to be paid up, without giving to the funds the direction which it is contended the charter requires.

The demand to withdraw any portion of the capital stock of a corporation, voluntarily and lawfully paid in pursuance of the provisions of the charter or by-laws, is entirely inadmissible. It is evident that the payment of the whole amount of the stock by some

of the corporators was within the intendment of the charter, for, besides other provisions, the 18th section of the act of 1835, expressly commands the payment of the dividends in proportion to the amount paid in.

If a partner lend money to a partnership, he undoubtedly becomes a creditor for that amount; but it is an error to confound such a case with the one under consideration. By this partnership, if it be one, each of the partners was at liberty to increase his interest to a certain amount, and was entitled to receive his proportion of profits accordingly; but having established his interest, and received his share of profits, by what provision of the charter, or on what principle of law, can he diminish it at pleasure, during the existence of the partnership?

The claim for interest is untenable. Interest can only be allowed in cases provided for by law. The interest allowed by the 18th section of the act of 1st April, 1835, is to be paid on the old stock—on instalments paid *previous to the opening of the new books*, and for any excess over those to be paid under that act. If those who should pay their stock in full under the new subscription, were entitled to interest in addition to dividends, provision would have been made for so important a privilege. It would not have been left to conjecture or implication.

The loans made to a stockholder, from the very nature of banking institutions, must be punctually paid, according to the regulations of the Bank, by which he, as a corporator, is bound. He cannot deviate from rules which he has himself prescribed for his own direction. Any other course leads to the very destruction of the object of the partnership.

Nothing but confusion can result from permitting a stockholder to set up matters which relate to the corporators *inter se*, against a loan received by him, and which is payable directly to the corporation. Is there any authority for this? Has such a right ever been recognized by a court? Is there any principle of law which countenances it?

Soulé, contra. The counsel for the Bank have brought into the debate a question not raised by the pleadings, and which could only have been presented in the shape of a peremptory exception.

It is contended that the suit brought by Millaudon cannot be

maintained, so long as the Bank has not proceeded to a complete liquidation. This position is untenable. I have attempted to show, that no other portion of the capital paid in by Millaudon can be considered as a component part of the partnership or banking fund, than that which corresponds to the capital called in by the Board. Indeed, if the rules laid down by all writers on partnership be adhered to—if a perfect equality be the fundamental principle of every commercial association, and particularly of an anonymous partnership like the one created by the charter of the Carrollton Bank, it will hardly be denied, that no one of the partners can be bound to contribute towards forming the general fund in a greater proportion than the rest. Thus, although, like all others, such partner may remain liable towards third parties to the whole extent of the capital subscribed, yet, as between the partners themselves, he will be to all intents and purposes a creditor of the common fund, for any surplus he may have paid above the amount demanded from the other stockholders or co-partners.

A stockholder in the situation of Millaudon presents a stronger case, on account of the peculiar situation of the Carrollton Bank, and the effect produced by the act of 1839 on its capital. The Bank, it is admitted, has gone into liquidation, and no other call for capital will hereafter be made on the stockholders. Besides, by the 2d section of the act of March 14th, 1839, the stock of the Banks which had then forfeited their charters by suspending specie payments, was limited to the amount which should be called in on the 1st of February, 1841; and the limitation is so absolute, that the Banks are precluded from acting on a larger amount of capital than that which may have been paid in at that period. It is thus clearly shown that, up to this day, but fifty per cent of the capital subscribed has been called in; and whatever excess may have been paid by anticipation, ceases to be a portion of the capital of the Bank. It could not be otherwise without a flagrant violation of the rule, that the most perfect equality shall exist between all the partners or stockholders.

The court below refused to allow the interest claimed. The 18th section of the act of 1835, allows it on any excess paid in advance by any stockholder.

The excess of capital paid by Millaudon, is no more a part of

the stock, than the portions remaining unpaid by the other partners. Such excess creates a debt against the partnership in favor of the partner who paid it, in the same manner as any deficiency on the part of any partner or stockholder, creates a debt against him in favor of the partnership.

Bullard, J. We may assume it as undoubtedly true, that no stockholder can be liable for more than a hundred dollars for each share holden by him; and that each share is to lose an equal amount on a final liquidation of the Bank. Hence, if the whole capital shall be found to have been sunk, those who have paid but fifty per cent will remain debtors for the balance of their subscription, and those who have paid up entirely cannot be called on for any more. If, on the other hand, it should turn out that there is a loss of fifty per cent, of the stock subscribed, then those who have paid up that amount are no further liable; but there will remain a balance in favor of those who have paid up in full, unless it be admitted that one share is to lose more than the others. If Millaudon were now garnisheed by the creditors of the Bank, he might defend himself by showing that he had paid up all he was bound to pay. If a stockholder, who had paid but fifty per cent, were sued, he would be liable towards the creditors of the institution for the balance of $50 per share. These appear self evident propositions. When Millaudon paid his shares in full, he did not suppose that he was to lose more on each share, ultimately, than any other stockholder. His position, relatively to the other stockholders, as partners, was unchanged, in our opinion, except as to the occasional dividends which he was entitled to draw in proportion to what he had paid in. Each still remained liable for the amount of his original subscription, and for neither more nor less. The only difference was, that Millaudon had anticipated the payment of all he could ever be called on to pay as a stockholder, necessarily, we think, under the tacit condition, that, if the concern should prove profitable, he should receive dividends of profits *a pro rata*, and, on the winding up of the concern, after the payment of its liabilities out of the surplus profits, that the whole capital stock which he had paid should be refunded to him; and, on the contrary, if the Bank should meet with disasters, that he should lose the same proportion upon each share, as the

other stockholders, and no more. If this be not true, then the original terms and conditions of the association have been materially changed from what they appear by the charter. According to the charter, each subscriber became liable and interested in proportion to his number of shares, and was to share in the profits and losses in that proportion. The resolution of the Board, under which Millaudon paid in full, contains only the condition, that he should receive dividends in proportion to the sum paid in. Can it be imagined that another condition is implied or understood in that resolution, to wit, that if the affairs of the Bank should prove disastrous, Millaudon should lose double the amount lost by the other stockholders; that he should lose the whole and the others only one-half of their subscription—of the capital which each stockholder engaged to put in? Such a construction of that resolution would be a very forced one, and involve the monstrous incongruity of one stockholder losing on the final settlement of the affairs of the Bank twice as much as another, merely because he had paid up his stock in advance.

Such are the principles which apply, as among the stockholders themselves—as between Millaudon and his co-corporators. They are the elementary principles of the law of partnership, stripped of all technical phraseology, and are to be found in the various authors who have treated on the subject. Some of them have been referred to by the counsel for Millaudon. Pothier considers it of the essence of the contract of partnership, that the parties should propose to make profits, in which each shall participate in proportion to what he has brought into the concern. He considers each as a debtor to the partnership for what he had promised to bring in. It results from this principle as a necessary corollary, that if one partner has brought in more than the others, he is a creditor of the partnership for the difference. Pothier, De Société, No. 12.

It is true that all the funds paid in, and all the property acquired form partnership stock, and, as it relates to creditors, stand as a pledge for the payment of all liabilities to the public. "Each partner," says Judge Story in his Treatise on Partnership, "has a specific lien on the present and future property of the partnership, not only for the debts and liabilities due to third persons, but

also for his own amount or share of the capital, stock, and funds, and for all moneys advanced by him for the use of the firm, and also for all debts due to the firm for moneys abstracted by any partner from such stock and funds beyond his share." Sect. 97.

The language of Bell in his Commentaries on the Scottish law, which sprang from the same fountain with our own, is very pithy and cogent on this subject. "The property of the company is common, held *pro indiviso* by all the partners as a stock and in trust, responsible for the debts of the concern, and subject, after the debts are paid, to division among the partners *according to their agreement.* This is a great point in the doctrine of partnership, and important consequences are deducible from it. The common stock includes all lands, houses, ships, leases, commodities, money—whatever is contributed by the partners to the company uses. It comprehends, also, whatever is created by the joint exertions of the company, or acquired in the course of the employment of their capital, skill, and industry. All this, by the operation of law and the nature and effect of the contract, becomes common property; is held by all the partners jointly for the uses of the partnership, and is directly answerable as stock for the payment of its debts." "The stock, or common fund, is held by the partners *pro indiviso.* This *pro indiviso* right implies, as between the parties themselves, a right of retention in each partner over the stock, for any advances which he may have made to the company, or for any debt due by the company for which he may be made responsible. It also implies, in relation to the public at large, creditors of the company, a trust in the several partners, as joint trustees, for the payment, in the first place, of the debts of the company." 2 Bell, 613.

There is an obvious distinction between the rights of the stockholders, *inter se*, and their rights and obligations in relation to the creditors of the Bank. We have found no difficulty in coming to the conclusion that, although in relation to the public, all the funds of the Bank, including what was paid in by Millaudon over and above what was paid by other stockholders, may be liable as stock to the creditors of the Bank, yet that, after their debts are paid, he would be entitled to receive double the amount which would be coming to the others. And this brings us to the inquiry,

whether the plaintiff be entitled, *at this time*, to withdraw what he has overpaid, or how far he may invoke the aid of the court to coerce such an administration on the part of the defendants as will secure his eventual rights, and maintain that equality in the contingent liabilities of the stockholders, which equity, as well as the charter, requires. And before entering into this part of the case, it may be premised that, as a consequence of the principles above stated, if it were now ascertained that the loss sustained by the institution would not exceed fifty per cent, Millaudon would be entitled, at once, to recover the excess paid by him on that amount. It is true that, if the Bank were yet in operation as such—if its capital were yet employed in banking, such an action would be premature; but it is admitted that the institution is in the progress of liquidation, having acceded to the terms of the act of the last legislature for that purpose. In liquidating the concerns of the Bank, the Board of Directors become the mandataries of the stockholders for that purpose, and the trustees of the creditors of the Bank. Their duties result from this twofold relation towards the stockholders and the public. They can declare no more dividends, nor subject the stockholders to any new liabilities. They are so to husband the resources of the Bank, as to meet all its existing liabilities, and preserve for the stockholders as much of the capital as possible. If, for the purpose of paying debts, a further call upon the stockholders who have not paid their subscriptions in full, should be necessary, we do not doubt the authority and obligation of the Directors to make the call. The act of 1839, upon which the counsel for the Bank rely to show that no further contribution can be required, we think does not diminish any of the original liabilities of the stockholders, and that they still remain contingently liable for the full amount of their subscriptions; but that, for purposes of banking, the capital stock, as it stood in March, 1840, was not to be changed. But if a loss should be ascertained, for example, of sixty per cent on each share, the Directors are authorized to call in ten per cent from those who have paid but fifty, and to employ, for the purpose of paying the loss, ten dollars per share of the stock paid in full by Millaudon. Equity forbids that, in such a contingency, the whole amount paid by Millaudon should be used in paying the

deficit, and that he should be turned over to his action against each stockholder to be reimbursed what he may have paid over his share. In a direct action by a creditor against the Bank, that fund would undoubtedly be a Bank fund, liable to execution, because, *quoad* the creditors, it is capital stock; but it does not follow that the liquidators of the institution would be justified in desisting from calling upon the other stockholders to contribute their share, and in employing what, as between themselves, belongs to Millaudon, in paying a common debt.

The application of those principles to the cases before us is not free from difficulty. The two cases were consolidated. In the first, in which Millaudon is plaintiff, he shows that he is the owner of 2785 shares which have been paid in full, one half, to wit, $139,250, over and above the other stockholders, under the resolution of the Board of Directors above alluded to. He complains that the Board has refused to call upon the other stockholders to pay the balances due by them, and thereby place all upon an equal footing, and he prays that the court would decree: *first*, that the whole stock be called in, and all the stockholders ordered to pay the fifty per cent remaining due; *secondly*, in default thereof, or in case of inability, that the surplus paid by him, to wit, $139,250, be refunded to him; *thirdly*, that he be paid interest from the 1st of March, 1841, on said surplus; *fourthly*, that the Bank be precluded from requiring any reduction on the loans made to him on the pledge of his stock, until all the stockholders be put on an equal footing with him; and he asks for general relief.

On the other hand, the Bank sues upon sundry stock notes of Millaudon, secured by a pledge of his whole stock, and amounting in all to $82,650; and, in his answer, the latter sets up substantially the same grounds of defence as form the basis of his direct action, and prays that the amount of the notes sued on may be compensated, by deducting so much from the amount paid by him over and besides that paid by, and required from, the other stockholders.

The Parish Court gave judgment in favor of Millaudon for $137,500 less the amount of his stock notes, amounting to $82,650, and interest; or, in other words, Millaudon recovered the whole

amount paid by him over the fifty per cent originally called in, and the Bank has appealed.

It will have been perceived, from what has already been said, that this judgment would accord with our views of the rights of the parties, if it had been ascertained that the loss sustained by the institution would amount only to fifty per cent on each share, or to less; and if the rights of the creditors, who have not yet been paid, had not been overlooked. It is liable to the further objection, that it does not reserve to the Directors the right to call back from Millaudon his proportion of stock, which may be required by the exigencies of the Bank if the losses should amount to more than the fifty per cent. It decrees a final adjustment of the matter in controversy, as if there were no debts to be provided for, or as if the creditors had no privilege on the fund, and the Directors were not in duty bound to provide for those debts.

This part of the case presents, therefore, two questions. *First.* Can the Directors, in the capacity in which they are now acting, recover on the stock notes, either absolutely or conditionally; or, is Millaudon entitled to retain that amount, at least until it be shown that it will be required to pay the creditors? *Secondly.* Can the court decree that any part of the capital stock shall be called in, if necessary, to pay creditors, and to maintain equality among the stockholders?

I. Upon the first point, it appears to us, as intimated above, that, since the Bank decided upon going into liquidation, the relations between the Directors and the stockholders have undergone a material change. While the Bank was in operation, a loan to a stockholder on a pledge of stock, was, like any other loan to a stranger, liable to be called in, or its payment coerced. Even the loan in question, upon stock fully paid, could not have been exempted from such liability, upon that ground. But, at this time, the position of Millaudon, who, independently of the amount due on the stock loan, has paid more than the other stockholders, appears to us to bear a strong analogy to that of a co-heir, indebted to the estate, who cannot be compelled to pay until after a final adjustment of accounts between the heirs. The necessity for the Directors to recover this sum in order to pay debts, is not shown. Why should the common mandatary receive or require from one

of his principals a larger amount than from another, to be employed for a common object? It is a fund which can no longer be used for any other purpose than the payment of the debts of the institution. If any more than the fifty per cent already paid in by the stockholders in general, should be required for that object, why should Millaudon's condition be rendered more onerous than that of the others? Besides the amount of the stock notes, he has, in the hands of the liquidators, $44,850, over and above what has been advanced by other stockholders having an equal number of shares.

As among the stockholders, he must be regarded as a creditor to the full amount of the surplus advanced by him; and, as it is no longer possible to declare dividends, it is not very obvious why he should not be entitled to interest, at least since the Bank ceased to operate as such. Millaudon must be considered as having, in his hands, an amount which, as relates to creditors, belongs to the common stock, and in case of necessity must be employed in the payment of debts, but which he is entitled to retain in his hands until that necessity be shown, in the further progress of the liquidation of the Bank. The doctrine as quoted above from Bell's Commentaries, seems applicable to this case, to wit, that the *pro indiviso* right of the partners implies, as between the parties themselves, a right of retention in each partner over the stock for any advances which he may have made to the company, or for any debt due by the company for which he may be made responsible.

II. As to the question, how far the court can interfere to require a calling in of stock to meet the exigencies of the Bank, and to equalize the burden of the stockholders, we may repeat, that we consider that the paramount duty of the Board; and, if they employ in paying debts any part of the fund furnished by Millaudon over and above the other stockholders, they are bound to replace it by calling in from the other stockholders such a proportion as will put all upon an equal footing, and thus be ready to account to him for the whole surplus, if the loss should not exceed fifty dollars per share on the whole stock. If the Directors should act otherwise, and throw a disproportionate burden upon him, he would have his redress, either by an action against his mandata-

ries, or the other stockholders. We cannot anticipate the necessity of such an application for redress, because we will presume that the defendants will act fairly and justly in winding up the affairs of the Bank. But that system of jurisprudence would be singularly defective, which should deny to the tribunals the authority to prevent anticipated wrongs, while they are competent to afford relief after their infliction. In the administration which the defendants have assumed under the statute, they are bound to take the law as their guide; and parties interested have a right to the aid of the courts to prevent a deviation from that rule, to their prejudice.

It is, therefore, adjudged and decreed that the judgment of the Parish Court be avoided and reversed; and it is further ordered and decreed, that in the case of the Bank against Millaudon upon the stock notes, there be judgment for the defendant, as in case of nonsuit; and that in the case of L. Millaudon against the Carrollton Bank, there be judgment in favor of the Bank as in case of nonsuit, reserving to the said Millaudon his right to recover, after the payment of the liabilities of the Bank to others than stockholders, the amount he may have paid over and above other stockholders, so far as the same shall not have been employed in the payment of such liabilities; and provided, that the President and Directors proceed to call in from the other stockholders, such further sums per share as shall be found necessary for the payment of the debts of the institution according to the principles recognized in this decree, if the loss should exceed the fifty per cent already paid in. And it is further ordered that the costs of the Parish Court be borne by the parties equally, and those of the appeal by the appellee.*

* *T. Slidell* and *Eustis*, for a re-hearing. No application is made to the court to reconsider so much of its opinion as defines the liabilities of the stockholders towards the public. Those who have paid but half their stock, it is conceded, can be called upon by the creditors of the Bank to pay further instalments, should the capital, now paid in, be insufficient to discharge the debts of the Bank. But the relations of the stockholders, *inter se*, are widely different from their relations to the public and to creditors. As among the stockholders themselves, the paying in of stock was, by the charter, left entirely to the Board of Directors. The Board never called in more than $50 per share. But it was willing and so resolved, "that any stockholder who shall

pay, in anticipation, a part or the full amount due on the shares held by him, shall be entitled thereon to dividends in proportion to the amount respectively paid in; *provided*, that no dividend shall be made or received in favor of any instalment which should not have been paid in more than three months prior to the declaration of such dividend." Such are the very words of the resolution of May 13th, 1836. Millaudon availed himself of this privilege.

Let us strip this case of any considerations which may entangle it, from the question being one concerning a Bank and the stock of a Bank. Such considerations are important in establishing the relations of the stockholders towards the public; but, *inter se*, the stockholders are mere partners. Let us imagine that A, B, and C associate themselves as partners in a commercial house. That, by the articles of partnership, they agree that the capital of the house shall be limited to $300,000, of which $100,000 is to be supplied by each partner. That they agree that each shall put in $5,000, to commence with; and that one of the firm, elected by the vote of all, shall fix, from time to time, the amount of capital to be called in, whose decision shall be imperative upon them. That it is also agreed, that the profits shall be divided at stated periods, and that each partner may withdraw his share thereof according to the amount he has paid in. Let us suppose that A is elected to perform this duty, and let us call him the Director of the firm. The Director calls upon the partners to pay in, each to the extent of $50,000. They do so, and in doing so fulfill all that their contract of partnership required of them. For without the call of the Director, to whose discretion the matter was submitted, none were bound to advance a dollar beyond the original $5,000. In this state of things the partners agree that if any partner choose, without a call, to put $50,000 more into the firm, so as to complete at once the total amount which he could be called upon in any event to advance, he may do so, and participate accordingly in the profits. B avails himself of the offer, advances $50,000 more, and the partnership stock stands thus:

A - - - - - -	$50,000
B - - - - - -	100,000
C - - - - - -	50,000

The business of the firm proceeds; the partnership prospers; $100,000 of profits is realized; the period for the division of profits arrives. How is this $100,000 of profits to be divided? Undoubtedly, like the dividends under the Bank's charter, in proportion to the amounts the partners have respectively paid into the firm. A then withdraws, for his share in the profits, $25,000; B for his share $50,000; and C receives $25,000.

The business of the partnership continues, the original capital remaining in the same position. The firm loses to the amount of $100,000. As the partnership fund was originally but $200,000, deducting the loss there remains but $100,000. Let us now suppose that the partners determine to go into liquidation. How is this $100,000 to be divided? We say that it should be divided according to the amounts which the partners respectively advanced; that A and C should take one-quarter, or $25,000 each, and that B should take $50,000; that the profits were divided according to this standard, and that the losses should be borne according to the same rule. *Qui sentit commodum, sentire debet et onus.* But the decision in this case declares, that B shall first deduct from these $100,000 the $50,000 which he has put in beyond

the other partners, and that the residue, to wit, $50,000, shall be divided among them, one-third, or $16,666 66 2-3, to each.

What then is the true and practical result of the application of this principle in the liquidation, *inter se*, of the partnership affairs. A put in $50,000; his profits were $25,000; his receipts on final liquidation are $16,666 66 2-3; and he is thus a loser by the partnership $8,333 33 1-3. C stands exactly in the same condition as A. B put in $100,000; his share of profits received is $50,000; his receipts on final liquidation are $66,666 66 2-3. Thus estimating their relative position on the final liquidation, B has gained 16 per cent on his investment, while A and C have each lost 16 per cent.

Is there any equity or justice in this? Is it possible that, with regard to the same subject matter, Millaudon can assume two different and inconsistent positions—that, as to profits, he should be considered a partner; but with reference to losses, a creditor? that his stock should be considered in the double light of an *investment in the partnership*, and of a *loan to the partnership*? The court has improperly considered Millaudon as a creditor and not a partner, and has applied to the relations of the partners, *inter se*, principles which, though undoubtedly true as regards the creditors of the Bank, are inapplicable to the stockholders as between themselves, and must necessarily lead to unjust results. The court has decided upon the rights of the stockholders, *inter se*, though not represented. The stockholders are not parties to the suit, so far as the adverse rights of their co-stockholder Millaudon are concerned. The corporation, as such, is a party to the suit against Millaudon, as its debtor upon his stock-notes. But the stockholders, as partners, are not parties to the suit; and as the decision of this court would not form *res judicata*, as between them and Millaudon, it ought not to prejudge the question which must hereafter arise between them and Millaudon, by establishing in this case the principles which are to govern, in the future division of the residuary assets of the partnership among its members.

Re-hearing refused.

The State *v.* The Mexican Gulf Railway Company.

A railway is not an immoveable, either by nature or destination, when the soil on which it is laid belongs to another; it is, consequently, not affected by judicial or legal mortgages, nor susceptible of being mortgaged unless authorized by a special act of the legislature.

Future property can never be the subject of conventional mortgage. C. C. 3276.

The act of 12th March, 1838, authorizing certain loans to be made to the Mexican Gulf Railway Company, and other Companies, does not, of itself, create a mortgage on the property of those Companies, nor could it without their consent. That consent is expressed by the acts of mortgage, executed in pursuance of it. The act contains only a proposition to loan, upon the execution of a mortgage on the property of the Company; when accepted, the mortgage exists, and is essentially conventional. The act did not contemplate taking a general mortgage on all the property of the Company, present and future.

The State v. The Mexican Gulf Railway Company.

APPEAL, by the defendants and certain intervenors, from a judgment of the District Court of the First District, in favor of the State, *Buchanan*, J.

BULLARD, J. The second section of the act of 12 March, 1838, entitled "An act amendatory of an act to expedite the construction of the New Orleans and Nashville Rail Road," declares, that the State engages to make a loan, among others, to the Gulf of Mexico Rail Road Company of $100,000, provided that before receiving the bonds of the State, &c., the Company shall execute their obligation to the State for the payment of the principal and interest of said bonds, the faithful payment thereof to be secured by mortgage and privilege on all the property, slaves, machinery, &c., of said Company, to be executed as required by an act of 13th March, 1837; and provided, that before executing the notarial act of mortgage, the Governor shall name three disinterested persons, who shall, under oath, appraise the property of the Company, and show satisfactorily to the Governor and the Treasurer of the State, that the mortgage, bonds, or obligations are sufficient to secure the State against all losses. The act contains certain other conditions and restrictions, not now important to mention.*

* The act of 12th March, 1838, provides:

Sect. 2. That for the purpose of facilitating the immediate construction of the Red River Rail Road, of the Baton Rouge and Clinton Rail Road, and of the Gulf of Mexico Rail Road, the State hereby engages to make a loan to said companies of the following amounts, viz: of one hundred thousand dollars to the Red River Rail Road Company; of seventy-five thousand dollars to the Baton Rouge and Clinton Rail Road Company; and of one hundred thousand dollars to the Gulf of Mexico Rail Road Company; *provided, however*, that before receiving the bonds of the State, the proceeds, or any part thereof, which proceeds are to be deposited in the Treasury of the State, the said companies shall be and they are hereby required to execute their respective obligations to the State for the payment of the principal and interest of said bonds, the faithful payment whereof to be secured by mortgage and privilege on all the property, slaves, machinery, &c. of said companies, to be executed in the same manner and effect, in every particular, as is required by the State of the New Orleans and Nashville Rail Road Company, by the second section of an act entitled "An act to expedite the construction of the New Orleans and Nashville Rail Road," approved 13th March, 1837; *and provided also*, that before executing the notarial act of mortgage, the Governor shall name three disinterested persons, who shall, under oath, appraise the respective property of each of said companies, and whose farther duty it shall be to satisfy the Governor and Treasurer of the State, that the respective property of each of said

In pursuance of this act, the Company executed to the Governor, at different times, three acts of mortgage, and received the bonds of the State, which were negotiated through the City Bank. These acts declare that the Company grants a first lien, privilege and mortgage to the State, upon all the property of the said Com-

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companies, and their mortgages, bonds, or obligations aforesaid, are sufficient to secure the State against all losses; *and provided, moreover*, that only ten thousand dollars of the proceeds of said bonds shall be paid over by the Treasurer of the State, for each mile of said Rail Road as soon as completed, not including that part of the Rail Road which may now be completed; *provided, also*, that the second, third, fourth, and fifth sections of the above recited act do apply to the aforesaid companies, &c.; *and provided*, that none of the provisions of the said second section [of the act of 13th March, 1837] shall affect the other Rail Road Companies mentioned in this act, except those by which the New Orleans and Nashville Rail Road Company shall be bound under this act, &c.

The act of 13th March, 1837, to expedite the construction of the New Orleans and Nashville Railroad, declares:

Sect. 2. That so soon as this act shall be accepted by said Company, evidenced by the consent of a majority in value of the stockholders thereof, and the same shall be made known to the satisfaction of the Governor and Treasurer of this State, and the President of said Company shall have executed a notarial act in pursuance of the consent of the stockholders aforesaid, in conformity with the provisions of this act, in favor of the Governor of this State and his successors in office, giving a first privilege, lien, and mortgage to the State of Louisiana upon all property of the Company, immoveables, slaves, rights, machinery, lots, railways, and generally upon all property which may appertain to said Company within the limits of the State of Louisiana, which first privilege, lien, and mortgage are hereby declared legal and obligatory, all laws to the contrary notwithstanding, for the faithful payment of the principal and interest of said loan as the same shall become due, it shall be the duty of the Treasurer of this State, and he is hereby authorized and required to issue the bonds of said State, and deliver the same to the President of said Company, &c.

Sect. 3. That in case the said Company shall fail to pay the said interest when the same shall become payable, then the principal of said bonds shall be considered as due, and the State of Louisiana shall enjoy all the rights resulting from the privilege, lien, and mortgage aforesaid, and may, on the petition of the Attorney General, filed in either of the District Courts of the First and Second Judicial districts of this State, or other competent tribunals, cause all the property, immoveables, slaves, rights, machinery, lots, railways, and generally all the property belonging to said Company, to be seized and sold, as required by the laws of the State in cases of mortgages with judgment confessed, for the purpose of enforcing the payment of the principal and interest of the bonds aforesaid; &c.

The parts of the second and third sections omitted in the above extracts, and the whole of the fourth and fifth sections of the act, are irrelevant to the questions involved in this action.

pany, slaves, machinery, railways, buildings, and more especially upon a car house then being constructed, a saw mill and appurtenances on the bayou Loutre, and a certain number of slaves who are mentioned by name.

The interest on the bonds not having been regularly paid, the Attorney General sued out an order of seizure and sale, according to the condition of the contract. Various creditors of the Company intervened, and opposed this proceeding on the part of the State, alleging superior privileges to that of the State, upon certain property of the Company not enumerated in the acts of mortgage.

First. F. De Lizardi & Co. claim the vendor's privilege for $6099 upon iron rails, laid down on a portion of the road not included in the mortgage given to the State, as well as the privilege of seizing creditors on the same, it having been seized previously to the issuing of the order of seizure in this case. They also claim as pledgees certain judgments, notes, and claims belonging to the Company, to secure the same debt.

Second. Albert, as agent of Norris, claims the vendor's privilege on a locomotive. He has also seized certain claims.

Third. Millaudon, and the Orleans Insurance Company, claim a judicial mortgage on a lot of ground, and on a slave acquired by the Company since the mortgage to the State.

Fourth. Lallande, and J. and L. Garnier claim as judgment creditors, having seized claims and suits of the Company.

Fifth. Smith, and others, in the employment of the Company, claim privileges as such.

Roselius, Attorney General, for the State. The act of 1838, under which the bonds of the State in favor of the Company were issued, refers in express terms to that of the 13th March, 1837, and makes the provisions of the second, third, fourth and fifth sections of the latter applicable to the transaction between the State and the defendants. The act of 1837 gives the State not merely a mortgage, but "the first lien, privilege, and mortgage on all the property of the Company, within the limits of the State, at the time the Company shall fail to pay either the principal or interest of the bonds." Persons contracting with the Company were

bound to know that the State had the first lien and mortgage on all its property.

S. L. Johnson and *L. Janin*, contra. By the second section of the act of 1838, the Company is required to execute its obligation for the loan made by the State, and to secure its payment by a mortgage. An act, on the part of the Company, was necessary to secure the payment; and this act was required to be executed in the same manner as the acts prescribed by the second section of the act of 13th March, 1837. It was not to be accepted, until the property should have been appraised by three persons appointed by the Governor. The property to be thus appraised, must have been in existence, and this excludes the idea that the future property of the Company was to be affected. This is made still clearer by that part of the section which directs that the loan shall be made only in case the appraisers, the Governor, and the Treasurer shall all be satisfied, that the property so appraised is sufficient to protect the State against loss.

But it has been contended by the Attorney General that the second, third, fourth, and fifth sections of the act of 13th March, 1837, apply to the Mexican Gulf Railway Company, and warrant the construction he has put upon the rights of the State, and the obligations of the Company. The fourth and fifth sections of that act have no bearing upon the present controversy. By the second section it is provided: "That so soon as the President of said Company shall have executed a notarial act, &c., in favor of the Governor of this State and his successors in office, giving a first lien, privilege, and mortgage to the State, upon all property of the Company, immoveables, slaves, rights, machines, lots, railways, and generally upon all property which may appertain to said Company within the limits of the State of Louisiana, which first privilege, lien, and mortgage are hereby declared legal and obligatory, all laws to the contrary notwithstanding, &c., it shall be the duty of the Treasurer to issue the bonds," &c. It thus appears that the *notarial act gives the lien, privilege, or mortgage*, and that it extends only to the property specially affected by the act, which says nothing of future property.

The third section of the act of 1837, provides, that in the event of the failure of the Company to pay either the principal or in-

terest of the bonds, the whole shall be considered as due, and that the State "shall enjoy all the rights *resulting from the privilege, lien, and mortgage aforesaid*, and may cause all the property, immoveables, slaves, rights, machinery, lots, railways, and generally all the property belonging to said Company, to be seized and sold, as required by the laws of the State *in cases of mortgage with judgment confessed*;"—that is, that the State shall enjoy all the rights resulting from the *act aforesaid*, which gave no rights upon future, or any other property than that specially described therein. The rights of the State are those of a mortgagee under an act importing a confession of judgment, and apply only to the property specially mortgaged. An order of seizure and sale is to be taken out, without citing the defendant; and the evidence of debt, as well as the property bound, must, therefore, appear from the notarial act. The judge can order the seizure of no other property than that specified in the act. In the absence of clear and precise provisions, the court will not presume that the legislature intended to alter the general laws of the State, and dispense with a description, in the act, of the property mortgaged, (Civil Code, arts. 3273, 3274,) or to authorize the mortgaging of future property. Civil Code, art. 3276.

Bullard, J. Among the admissions of the parties in the record, is the following: "The land on which the Rail Road has been made does not belong to the Company, none of the owners having been expropriated." It is not, therefore, independently of the act of the legislature, susceptible of being mortgaged, and is not affected by judicial or legal mortgages. That act, we doubt not, rendered it susceptible of being mortgaged, and subjected it to a special conventional privilege, so far as the State is concerned, and for the purpose of securing the reimbursement of the loan; but the Railway is not an immoveable, either by nature or destination, if the soil over which it is laid belongs to another. The rails, therefore, did not become immoveable by being laid down.

It is also clear that future property can never be the subject of conventional mortgage. Civ. Code, art. 3276. To this it is replied by the Attorney General, that the mortgage results from the special law passed in this case. We do not so understand it. The act does not create the mortgage, nor could it without the

consent of the corporation. That consent is expressed in the acts of mortgage. The statute contains only the proposition to loan upon the execution of a lien, privilege, and mortgage upon all the property of the Company. As soon as that proposition is accepted the mortgage exists, and is essentially conventional. That the legislature did not intend to take a general mortgage upon all the property of the Company, present and future, real or moveable, appears also from the clause in the act which requires the appointment of appraisers of its property, who were to satisfy the Governor and the State Treasurer that the property and the bond of the Company are sufficient to secure the State. It was evidently not contemplated that the mortgage should embrace property to be acquired afterwards, because it could neither be appraised nor described, much less that it should defeat the vendor's privilege on property afterwards acquired on credit, or judicial mortgages on lands or slaves which did not belong to the Company at the date of the act of mortgage.

The application of these principles to the cases of the different creditors who have made opposition, is not difficult.

The slave Peter acquired from Phelps, and the lot of ground in the *faubourg* Franklin, are not mortgaged to the State, and are subject to the judgment of Millaudon, Albert, and the Orleans Insurance Company.

De Lizardi & Co. claim the privilege of vendors on the iron rails laid down on the road, except for the first six miles; and their right had been recognized, and they had actually seized under execution, when the State interfered by injunction, alleging a superior right under the statute, and the acts of mortgage and privilege. The rails not having been attached to an immoveable, were still, in our opinion, subject to the vendor's lien, and the injunction obtained by the State ought not to be sustained.

The same principles apply to the other privileged creditors; and we are of opinion, that the opposing creditors have a right to be paid in preference to the State.

It is, therefore, ordered, that the judgment of the District Court be reversed; that the opposing creditors be first paid out of the the property subject to their privileges; and that, to this extent, the injunctions of the opposing creditors be perpetuated.

In the cases of *Claude Tournier* v. *Chauchon and another*, *William Prehn* v. *Etienne Rivolet and another*, and *Alphonse Regnier* v. *R. H. Hawthorn and another*, from the City Court of New Orleans; of *William F. Thompson, Syndic*, v. *Elizabeth Morris and Husband*, *Joseph Albert* v. *Artemon Hill and another*, *Thomas C. Magoffin* v. *Oliver Dubois and another*, *Laurent Millaudon* v. *Artemon Hill and another*, *William Frost and another* v. *Jacques Léon and others*, *Michael Maher* v. *Patrick Summers*, *John D. James* v. *How Hinds*, *Benjamin Florance* v. *Joseph A. Beard*, and *Benjamin Florance* v. *John Mitchell*, from the Commercial Court of New Orleans; of *Neally and another*, v. *Wellington and another*, *Paul Liautaud* v. *Jean Jonau*, and *Thomas H. Gorman* v. *Seth W. Nye*, from the District Court of the First District, the judgments of the lower courts were affirmed on appeal, in New Orleans, with damages, during the period embraced by this volume.

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APPEAL.

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I. *From what Judgments an Appeal will lie.*

1. Where the creditors of a succession are litigating their rights contradictorily with each other, and the value of the succession exceeds three hundred dollars, an appeal will lie to the Supreme Court, though the claim of each creditor may not amount to that sum. *Succession of Field*, 5.
2. Where the act which imposes a fine prescribes that it shall be recovered by a civil action, the officers of the State cannot, by instituting a suit in the form of an indictment, deprive the party of the right of appeal to the Supreme Court. *State* v. *Linton*, 55.
3. An appeal will lie from an order maintaining an injunction until the succeeding term of the court. It is an interlocutory judgment which may effect irreparable injury. *Newell* v. *Morton*, 102.
4. Where the matter really in dispute is under three hundred dollars, and a larger amount is claimed in the petition, evidently for the purpose of giving jurisdiction to the appellate court, the appeal will be dismissed. *Dabbs* v. *Stevens*, 143.
5. The jurisdiction of the Supreme Court is to be determined by the value of what is claimed in the petition, not by the amount allowed by the judgment. *Gerber* v. *Marzoni*, 370.
6. An appeal will lie from a judgment on a demand in reconvention, where the sum claimed in reconvention is sufficient to give jurisdiction to the appellate court, though the original demand be under three hundred dollars; but the judgment on the latter cannot be examined into. The demand in reconvention is in the nature of a new action. *Gore* v. *Kendig*, 387.
7. No appeal will lie from an order, discharging a rule to show cause why an injunction should not be dissolved, on the ground that the petition sets forth

no legal cause for issuing it. The order is an interlocutory one, and works no irreparable injury. If erroneous, it may be corrected by appeal from the final judgment. *Osborne* v. *Clayton*, 437.

II. *Period within which Appeal will lie.*

8. Where an appeal is taken, after the lapse of twelve months from the day on which final judgment was rendered, by one who alleges in his petition of appeal that he is a non-resident, and the allegation is denied, the case will be remanded to try the issue; and until the judgment rendered thereon, and the evidence on which it is based, is sent up, no opinion will be pronounced on any other point in the case. *Griffing* v. *Bowmar*, 112.

9. The general doctrines relative to the interruption of prescription, do not apply to the period fixed by art. 593 of the Code of Practice, after which no appeal will lie. No appeal can be taken after the expiration of that time, though one may have been dismissed, which was taken within the period. *Ib.* 113.

III. *Abandonment of Right to Appeal.*

10. Where, after obtaining an order allowing him an appeal, plaintiff does not appear to have attempted to avail himself of it by giving bond and security, nor to have taken any steps, until after the expiration of a year from the date of the judgment, to procure a transcript of the record, nor to have made any application to the judge *a quo* for a new appeal, the right of appeal will be lost.

Sibley v. *Roman Catholic Congregation of Natchitoches*, 27.

11. When the period has elapsed within which a party might have appealed, he will not be allowed to contest his rights in the name of another appellant. *Griffing* v. *Bowmar*, 112.

12. In an action to recover the undivided half of a tract of land, for the rents and profits from the commencement of defendant's illegal possession, and for a division of the tract, there was a judgment for the plaintiff for the portion of the land claimed, and in favor of defendant for a certain sum for his improvements over and above the amount due by him for rents and profits. The decree ordered a partition of the land. In conformity with the part of the judgment ordering a partition, plaintiff proceeded to have the tract divided, and the respective portions designated by a further decree homologating the proceedings of the notary and experts in making the partition, and ordering himself to be put in possession of the half allotted to him, on paying the amount previously adjudged to be due for the improvements. *Held*, that this was not such an acquiescence, on the part of the plaintiff, in the judgment, by voluntarily executing it, as is contemplated by art. 567 of the Code of Practice, and will not prevent his appealing from so much thereof as condemns him to pay for the improvements above the rents and profits. *Milliken* v. *Rowley*, 253.

IV. *Appeal Bond.*

13. The signature of the appellant is not necessary to the appeal bond. His

obligation to discharge any judgment rendered against him on the appeal, results from the judgment itself. *Fisk* v. *Friend*, 264.

V. *Effect of Appeal.*

14. Where, through error, an order has been made allowing a suspensive appeal on security for costs only, and no transcript of the record has been delivered to the party, the order may be rescinded by the lower court on a rule to show cause. *Mathison* v. *Field*, 42.

15. Where the amount fixed by the judge for the appeal bond, is less than that required by law to render the appeal suspensive, it will be good as a devolutive one; the bond, in the latter case, being only to secure the payment of the costs. *Tipton* v. *Crow*, 63.

VI. *Parties to Appeal.*

16. In an action on a joint contract, the suit was dismissed by the inferior court as to one of the defendants, on the ground of his domicil being in a different parish. Plaintiff took no appeal from the judgment of dismissal, but obtained a judgment against the other defendant. On an appeal by the latter: *Held*, that the action being on a joint contract, both contractors must be before the court; that the plaintiff having failed to make use of the means given him by law to reverse the erroneous decision of the inferior court, cannot avail himself of his own neglect; and that there must be judgment as in case of nonsuit. *Thompson* v. *Chrétien*, 26.

17. The testator had bequeathed all his estate to his mother and one of his sisters. An order for a sale of the property having been procured by the executor, a sister of the deceased, to whom no part of the estate had been left, obtained an injunction to prevent the sale, and the curator of the testator's mother, an interdicted person, intervened in the suit, alleging that the latter was a forced heir recognized by the will, that the injunction was for her benefit as well as the plaintiff's, claiming part of the damages sued for, and praying to be allowed, with the consent of the plaintiff, to unite with the latter, and to pay a part of the costs. Answer by defendant to the petition of intervention, denying the right of the curator to intervene; and judgment dissolving the injunction, and ordering the executor to proceed with the sale. On an appeal by plaintiff and intervenor: *Held*, that the plaintiff, having no interest in the succession of the testator, had no right to interfere with its administration: and that no judgment having been rendered for or against the intervenor in the lower court, his appeal must be dismissed. *Field* v. *Mathison*, 38.

18. Where an appeal is taken from a judgment in an action on a joint contract, all who were required to be parties below, must be made parties to the appeal, and this, though a part only have appealed, or the appeal will be dismissed. *Drew* v. *Atchison*, 140.

19. All the parties who are interested that the judgment should remain undisturbed, must be made parties to the appeal, or it will be dismissed.

Garcia, &c. v. *Their Creditors*, 436.

20. A creditor of an insolvent, in whose favor a judgment has been rendered, on a tableau of distribution, securing him a privilege or mortgage, must be made a party to any appeal, taken by another creditor or the syndic, for the purpose of reversing such judgment. *Ib.*

VII. *Citation of Appeal.*

21. Where an appellee resides in the State, service of citation of appeal must be on the party himself, and not on his counsel. *Lee* v. *Kemper*, 1.

22. Under the act of 20th March, 1839, time will be allowed to correct any error or omission in the service of citation of appeal, where such error or omission did not result from the fault or neglect of the appellant. *Ib.*

23. Failure to serve citation of appeal in due time, will authorize the appellee to delay his answer until the expiration of the period allowed him by law, or, perhaps, to require a new citation, but not to demand the dismissal of the appeal. *Grove* v. *Harvey*, 271.

VIII. *Record of Appeal.*

24. Under the act of 20th March, 1839, time will be allowed to correct any errors or omissions in the record of appeal, where such errors or omissions did not result from the fault or neglect of the appellant. *Lee* v. *Kemper*, 1.

25. Where it does not appear from the record, that the amount in controversy exceeds three hundred dollars, the appeal must be dismissed. The appellant must show that he is entitled to an appeal. *Hall* v. *Sanders*, 10.

26. Third persons, not parties to the suit, who allege themselves aggrieved by the judgment, to whom the right of appeal is given by art. 571 of the Code of Practice, are entitled to avail themselves of every thing in the record affecting their rights. *Griffing* v. *Bowmar*, 113.

27. Where the record shows that the defendant moved to have a judgment by default set aside, he will not be permitted to urge before the appellate court, that no such judgment was obtained. *Hemken* v. *Farmer*, 155.

28. It is not required that the grounds upon which a judgment by default was taken, should be stated in the record. The absence of any exception, or answer, is, itself, evident and sufficient ground. *Ib.*

29. Where the record contains the evidence on which a judgment by default was made final, it is unnecessary that it should state that it was taken down at the request of either party. *Ib.*

30. A certificate by the clerk, that the record "contains all the evidence upon which the judgment appealed from was rendered," is insufficient. *Grand Gulf Rail Road and Banking Co.* v. *Douglass*, 169.

31. Where the appellee has answered to the merits, and the record is so defective that the case cannot be examined, and justice requires that it should be tried *de novo*, the judgment of the lower court will be reversed, and the case remanded. *Ib.*

32. Where the evidence has not been taken in writing, it is the duty of the appellant to require the adverse party to join him in drawing up a statement

of the facts, or, in case of disagreement or refusal by the other party, to apply to the court to make such a statement, in order that the clerk may prepare a complete record of the case. *Ib.*

33. A bill of exceptions is only necessary, where something is to be brought to the knowledge of the appellate court, which would not otherwise appear in the record. *Harrison* v. *Weymouth*, 340.

See 36, *infra.*

IX. *Answer and Exceptions waived below, or which may be pleaded for the first time on Appeal.*

34. A prayer for the amendment of a judgment must be made when the answer to the appeal is filed. It will be too late, when the case is fixed for trial. *McGuire* v. *Bry*, 196.

35. An exception to the jurisdiction of the court, waived below, cannot be revived in the appellate court. *Reynolds* v. *Rowley*, 201.

36. There is a class of exceptions which may be pleaded for the first time on the appeal; but the facts necessary to sustain them, must appear from a mere inspection of the record. *Zollicoffer* v. *Briggs*, 236.

X. *Verdict and Judgment appealed from.*

37. The verdict of a jury will not be disturbed, unless clearly wrong. *McCoy* v. *Hunter*, 118. *Hughes* v. *Lee*, 429.

38. A case will not be remanded, after appeal, on an affidavit of newly discovered evidence. The court cannot notice any thing which may have occurred subsequent to the date of the judgment appealed from. *Succession of Hamblin*, 130.

39. On a question of fact, the judgment of the lower court will be affirmed, unless manifestly erroneous. *Bordelon* v. *Kilpatrick*, 159.

40. Action for the balance of an account, with interest, and verdict and judgment in favor of plaintiffs for a certain sum, without interest, and no new trial applied for by the latter. On an appeal by defendant, and prayer by plaintiffs for the amendment of the judgment, so as to allow the interest claimed: *Held*, that no attempt having been made to correct the judgment in the court below, by moving for a new trial, no amendment can be allowed in the appellate court. *Lambeth* v. *Burney*, 254.

41. The admission of irrelevant testimony is no ground for remanding a case for a new trial, where its exclusion would not probably vary the result. *Ferguson* v. *Whipple*, 344.

42. Objections to a verdict lose much of their weight, when not made before the court which tried the case originally. A case will be less readily remanded on a question of fact, where a new trial has not been moved for below. An appeal from the judgment of an inferior tribunal, founded on a verdict, should only be taken after the refusal of a new trial. *Hughes* v. *Lee*, 429.

43. The decisions of inferior tribunals in matters addressed to their discretion, will not be interfered with, unless in cases of extreme hardship or manifest injustice. *Gottheil* v. *Fisk*, 434.

44. Where the petition prays for a judgment against defendants *in solido*, and one of the latter severs in his answer, but does not plead that the obligation is joint only, and judgment is rendered against defendants *in solido*, it will not be disturbed on appeal. *Comstock* v. *Paie*, 440.

Vide 31, *supra*.

XI. *Damages on Appeal.*

45. The court has no authority to give damages for a frivolous appeal, when not prayed for. *Garrett* v. *Grimball*, 8.

ARGUMENT OF CASE.

A party against whom an order of seizure and sale had been issued, presented a petition alleging that the mortgage and notes were obtained by fraud, and that the mortgage was illegally executed, and praying for an injunction, for a judgment rescinding the act, for damages against the mortgagee and a third person alleged to have been concerned in the fraud, and for a trial by jury. The mortgagee answered, praying that the injunction might be dissolved, the demand rejected, and for a judgment in his favor for the amount of his debt. *Held*, that the causes of opposition not being confined to those enumerated in art. 739 of the Code of Practice, and the proceedings having been changed from the *via executiva* to the *via ordinaria*, the mortgagee must be considered as a defendant in the proceedings to obtain the injunction; and that the other party, like other plaintiffs, was entitled to open and close the argument. *Beaulieu* v. *Furst*, 345.

ASSIGNEE.

See BANKRUPTCY, 2.

ATTACHMENT.

1. The formalities prescribed by art. 254 of the Code of Practice, which requires where the defendant has no known place of residence, or conceals his person, or is absent, or resides out of the State, that the sheriff shall serve the attachment and citation, by affixing copies thereof to the door of the parish church of the place, or to that of the room where the court in which the suit is pending is held, stand in the place of citation, and form the basis on which all subsequent proceedings must rest, and their omission will be fatal. Service of citation on the defendant, is the first step to be taken. *Putnam* v. *Grand Gulf Rail Road and Banking Co.*, 239.

2. The remedy by attachment is a harsh one, and those who resort to it, must comply strictly with the requisites of the law. *Ib.*

3. The subsequent return of a party, whose property had been attached on an affidavit that he had left the State with the intention of never returning, will not alone be sufficient ground for dissolving the writ, where circumstances render it probable that his original intention was not to return. The intention of returning should have been clearly proved, to entitle the defendant to a dissolution of the attachment. *Reeves* v. *Comly*, 363.

4. The surety in an attachment, though a resident of a different parish, may, under the third section of the act of 20th March, 1839, be proceeded against, summarily, before the court by which the original suit was decided. The object of that section was to authorize the court before which the action was instituted, to determine all questions, principal and incidental, raised in the course of the proceedin s, and thus to secure a speedy adjustment of the rights of the plaintiff. *Wallace* v. *Glover*, 411.

5. Where plaintiff, in an action commenced by attachment, has obtained a judgment before defendant's application to be declared a bankrupt under the act of Congress of 1841, he will be entitled to a preference on the property attached. *Aliter*, where defendant's application was made before judgment. In the last case no privilege is acquired. *Fisher* v. *Vose*, 457.

ATTORNEY AT LAW.

1. An attorney is not admissible as a witness to disclose facts, the knowledge of which he acquired confidentially, in the practice of his profession. But when in possession of papers belonging to his client's adversary, or when called on, after having had them in his possession, to disclose what he has done with them, or to point out where they may be found, the rule does not apply; and he may be as properly called on to produce the papers necessary to establish the rights of the adverse party, if still in his possession, or interrogated as to facts which may lead to their discovery, as his client himself could be. C. P. 140, 473. *Travis* v. *January*, 227.

2. An agreement, by an attorney at law, to receive payment of a judgment in any thing but the legal currency of the United States, will not be binding on the plaintiff. *Dunbar* v. *Morris*, 278.

3. On a rule upon an attorney, under the third section of the act of 27th March, 1823, to show cause why an information should not be filed against him, it is the duty of the judge by whom the rule was granted, to decide as to the sufficiency of the cause shown. The act does not require that the Attorney General should be notified of, or take any part in this preliminary proceeding. *State* v. *Judge of First District*, 416.

ATTORNEY, DISTRICT.

The twenty-first sect. of the act of 22d February, 1817, which allows the prosecuting attorneys on behalf of the State, ten per cent on amounts collected by them, to be paid by the defendant, will not authorize the allowance of such a commission to a District Attorney, who appears on behalf of the officers of the State, for the purpose of dissolving an injunction, obtained by

a delinquent sheriff to stay an execution issued against him by the Treasurer. The defence of such a suit, is one of the duties that devolves on the District Attorney as a public officer. *Scarborough* v. *Stevens*, 147.

ATTORNEY IN FACT.

See AGENCY. EVIDENCE, 32.

BAIL.

1. Where the condition of a recognizance is, that the principal shall appear at court to answer such matters and things as may be objected against him on behalf of the State, and shall not depart the said court without leave thereof, and no formal surrender has been made of him to the sheriff by his sureties, and the accused effects an escape from the court room while the jury are deliberating on his case, the recognizance will be forfeited. His sureties might have released themselves, at any time, by a surrender of their principal; but until manifesting, by an actual surrender, their intention to be no longer bound, the principal remained in their custody, notwithstanding his appearance in court. *State* v. *Martel*, 22.
2. Whenever a question arises out of a bail bond, it is incidental to the main action, and may be tried summarily, without instituting a new suit.

Wallace v. *Glover*, 411.

BANK.

1. When the rate of interest to be charged by a Bank on loans or discounts, is limited by its charter, it cannot stipulate for a higher rate on the amount of any loan or discount, in consideration of its forbearance to sue.

Exchange and Banking Company of New Orleans v. *Boyce*, 307.

2. The act of incorporation of a banking company provided that its capital should be divided into shares of one hundred dollars, of which five dollars should be paid at the time of subscribing for the stock, and the residue in such instalments, and at such times, as might be required by the Directors. Fifty dollars on each share were called in, and paid. A resolution, subsequently adopted by the Directors, provided, "that any stockholder who shall pay in anticipation a part, or the full amount due on the stock held by him, shall be entitled to dividends thereon in proportion to the amount so paid in." Under this resolution, a stockholder paid up the whole amount due on the stock held by him, and received dividends thereon, and loans (less, however, than the amount so advanced by him) upon the pledge of it. The Bank having gone into liquidation, required the re-payment of the loan, and refused to call for further contributions from the other stockholders. An action was commenced by the stockholder who had paid in full against the Bank, to compel the calling in of the whole amount subscribed, or, in default thereof, or in the event of the inability of the stockholders to pay the balance due, to recover the amount paid by him beyond fifty dollars on each share, with interest on the over-payment, and to restrain the company, from ex-

acting re-payment of the loan made to him, until the stockholders should be placed on an equality as to their payments. The Bank, thereupon, sued on the notes given for the loan. On appeal from a judgment rendered in the two actions, which had been consolidated: *Held*, That no stockholder can be liable for more than one hundred dollars on each share held by him, and that each share must lose an equal amount on the final liquidation of the Bank. That if the whole capital be sunk, those who have paid but fifty per cent will be debtors for the balance, and those who have paid in full cannot be called on for more. That if but half have been lost, the former are no further liable, but a balance will be due to the stockholder who has paid in full. That the payment of the whole amount of the shares under the resolution of the Directors, did not change the relative position of the stockholders to each other as partners, except as to the dividends, the one having merely anticipated the payment of all he could ever be called upon to pay, and the others remaining liable for the balance of their subscriptions. That the payment was under the tacit condition that, if the concern proved profitable, the party so paying should receive dividends in proportion to the amount paid by him, and on the winding up of its business, after payment of the debts from the surplus profits, the whole amount so paid in; and, if not profitable, that he should lose only the same proportion, upon each share, as the other stockholders. That *quoad* the creditors of the Bank, the excess above fifty per cent so paid is capital, liable for its debts; but that, as among the stockholders, the party who made the advance is a creditor to the extent of the surplus, and entitled to interest thereon from the time when the Bank ceased its operations. That the stockholders are liable for the whole amount of their subscriptions, and that, if any further payment beyond fifty dollars on each share be necessary to the discharge of the debts of the company, it will be the duty of the Directors to call on all the stockholders for an equal contribution; and that it would be unjust to use the amount paid by one stockholder, beyond the others, for that purpose. That the Bank having gone into liquidation, a stockholder may maintain an action against it; and that the loan, being less than the amount advanced by the borrower beyond the other stockholders, may be retained by him, unless required for his proportionate contribution towards the payment of the debts of the company.

Millaudon v. *The New Orleans and Carrollton Rail Road Co.*, 488.

BANKRUPTCY.

1. The object of the act of Congress of the 19th August, 1841, establishing a uniform system of bankruptcy, was, while it released the debtor, to distribute the proceeds of his property as equitably as possible among his creditors, due regard being had to the nature of the different contracts and liens affecting it. *Fisher* v. *Vose*, 457.

2. Where a party to a suit pending before a State court, applies to be declared a bankrupt under the act of Congress of 19th August, 1841, the proceedings must be suspended, for a reasonable time, to enable him to file the decree, when the assignee must be made a party. As soon as the decree in bankruptcy is pronounced, the bankrupt, in relation to all actions for and against

him except such as the statute prescribes, is legally dead, and can only be represented by the assignee. *Ib.*

3. Where plaintiff, in an action commenced by attachment, has obtained a judgment before defendant's application to be declared a bankrupt under the act of Congress of 1841, he will be entitled to a preference on the property attached. *Aliter*, where defendant's application was made before judgment. In the last case, no privilege is acquired. *Ib.*

BILLS OF EXCHANGE AND PROMISSORY NOTES.

I. *Accommodation Endorsers.*
II. *Transfer.*
III. *Presentment for Payment.*
IV. *Indulgence, or Release of a Party.*
V. *Protest for Non-Payment.*
VI. *Evidence in Action on.*
VII. *Payment.*

I. *Accommodation Endorsers.*

1. An accommodation endorser, must be viewed in the light of a surety, and as such is entitled to discuss the property of his principal.

Dwight v. *Linton*, 57.

II. *Transfer.*

2. The payee of a note made by the defendant, desiring to secure a debt due to plaintiffs, endorsed the note in blank, and deposited it in the hands of plaintiffs' attorney, to apply a portion of the proceeds, when due, to the payment of the debt; the balance to be accounted for to the endorser. Defendant was notified of the transfer to plaintiffs' attorney for the purposes mentioned, and promised to pay the note to the attorney. In an action against the maker: *Held*, that the endorsement and delivery of the note for the purposes stated, and the notice to defendant, operated a legal transfer of the portion intended to be paid to the plaintiffs; that defendant's promise established his consent to the division of the debt; that claims against the payee, subsequently acquired by defendant, can only be set off against the portion of the note not transferred for plaintiffs' benefit; and that the attorney became the agent of both the plaintiffs and payee, and was accountable to each for the portions respectively due to them. *Lambeth* v. *Kerr*, 144.

3. One who purchases a note, knowing that the payment will be contested, will hold it subject to any defence to which it would have been subject in the hands of the payee. *Bordelon* v. *Kilpatrick*, 159.

4. The transfer of a negotiable note, by endorsement, operates a transfer of any mortgage given to secure its payment. C. C. 2615.

Auguste v. *Renard*, 389.

III. *Presentment for Payment.*

5. A note dated the 29th of August, payable at six months, will be due on the 3d of March following. *Wood* v. *Mullen*, 395.

6. Proof of demand of payment, at the place at which the note is payable, on or after its maturity, is essential to a recovery in an action on the note *Ib.*

IV. *Indulgence, or Release of a Party.*

7. Discharging, or giving time to any of the parties to a note or bill, is a discharge of every other party who, upon paying it, would be entitled to sue the party to whom such discharge or indulgence has been granted.

Calliham v. *Tanner*, 399.

8. The holder of a protested note, having presented it for payment to the administrator of the succession of the payee and first endorser, it was allowed by the latter, and placed on the tableau of distribution filed by him. Subsequently to the homologation of the tableau, the holder obtained a judgment, by confession, against the second endorser, and, in consideration of a higher rate of interest, granted him time, at the expiration of which the latter paid the amount due on the note. In an action by the second endorser against the administrator of the first, to recover the amount thus paid: *Held*, that the first endorser, who would have been entitled, on payment of the note to the holder, to require its delivery, that he might exercise his rights against the maker, was discharged by the indulgence; and that the insolvency of the maker, at the time of the indulgence, cannot affect the question of his discharge. *Ib.*

V. *Protest for Non-Payment.*

9. Notice of protest must be directed to the post office nearest the residence of the person to whom it is sent. Even where a party has been in the habit of receiving his letters at different offices, and is proved to have had a box in the most distant of the two, notice of protest directed to the latter will be bad. *Mechanics and Traders Bank of New Orleans* v. *Compton*, 4. *Nicholson* v. *Marders*, 242.

10. The act of thirteenth of March, 1827, relative to the protest and notices to drawers and endorsers of bills and notes, does not change the general commercial law, as to the diligence to be used in serving notices of protest; it merely provides a new mode of proof of such diligence, by authorizing the notary, or other officer, to state in his protest the manner in which the demand was made of the drawer, acceptor, or person by whom such order or bill was drawn or given, and, in a certificate subjoined thereto, the manner in which the notices were served or forwarded, and by making a certified copy of such protest and certificate evidence of all the matters therein stated. The provisions of this act being in derogation of the general commercial law, the mode of proof which it authorizes will be received as sufficient evidence of notice, only where the formalities it prescribes have been strictly complied with. *Duncan* v. *Sparrow*, 164.

11. Where the party to whom notice is to be given, does not reside in the town

where the protest was made, the second section of the act of 1827, requires, *first*, that the notice be put into the post office nearest to the place where the protest was made, and *secondly*, that it be addressed to the party to be notified, at his domicil or usual place of residence; and the omission of either will be fatal. *Ib.*

12. A notice of protest addressed to a party, at the post office from which he receives his letters and the one nearest to his residence, or addressed to him, without indicating any particular place, and deposited in such post-office, will not be a sufficient compliance with section two of the act of 1827. The notice must, in addition, be addressed to him at his domicil or usual place of residence. *Ib.*

13. Notice of protest to an endorser, put into the post office at the place where the note was payable and at which he was in the habit of receiving his letters, addressed to him there, is insufficient by the law of Mississippi. Otherwise, in this State, since the act of thirteenth of March, 1827.

Ib. Application for Re-hearing, 167.

14. Proof that notice of protest was deposited in the post office at seven o'clock, A. M. the day after the protest, shows due diligence; and it will be presumed, in the absence of evidence to the contrary, that the notice was in time to go by the mail of that day. *Commercial Bank of Natchez* v. *King*, 243.

15. The certificate of a notary that "he left the notice of protest at the domicil of the endorser," is sufficient. It is not necessary that it should show whether he delivered the notice to one in the house, or simply left it there, as a notice either way is good. *Manadue* v. *Kitchen*, 261.

16. Notice to one who resides in a place where the protest was made, must be served personally, or by leaving it at his residence or place of business. *Ib.*

17. Where a party resides at two places, alternately, being generally at one during one portion of the year, and at the other during the rest, but goes frequently from one to the other, notice of protest, directed to either, will be sufficient.

Exchange and Banking Company of New Orleans v. *Boyce*, 307.

VI. *Evidence in Action on.*

18. Art. 2256 of the Civil Code, which provides that parol evidence shall not be received against or beyond what is contained in written acts, is inapplicable to a case where the defendant offers witnesses to prove that the endorsement of a note was merely as security, and that it was to be paid out of collections to be made by him from claims due to the drawer. The evidence neither explains, nor contradicts the written instrument, but goes to establish a collateral fact or agreement in relation to it.

Dwight v. *Linton*, 57.

19. In an action in this State against the endorser of a note, dated at a place in this State in the parish in which the endorser resides, payable in another State, the presumption will be, until the contrary is shown, that the note was endorsed at the place of its execution; and the obligation will be governed by the *lex loci contractus*.

Duncan v. *Sparrow—Application for Re-hearing*, 167.

20. Where it clearly appears that defendant intended to authorize a third person to endorse certain notes in his name, he will be bound by such endorsement, though the letter of attorney were received by his agent after the endorsement. The authority, subsequently received, would amount, at least, to a ratification of the act of the agent.

Exchange and Banking Company of New Orleans v. *Boyce*, 307.

21. The holders of notes given for the price of a tract of land, though not identified with the sale by the *paraph* of a notary, will be entitled to a privilege on the thing sold. The *paraph* of the notary is not the only means by which the notes may be identified. Their identity may be proved by his oath. *Succession of Johnson*, 216.

22. A credit which appears to have been endorsed on a note while in the possession of the payees, will be binding on them, unless they show it to have been made through error. *Norcross* v. *Theurer*, 375.

See 6. 10. 14. *supra*.

VII. *Payment.*

23. The holder of an accepted draft for a sum payable in the notes of a particular Bank, protested at maturity, will be entitled to recover the value of the notes at the date of the protest. A subsequent tender of the amount in the notes of the Bank, they having depreciated in the mean time, will not entitle the defendant to settle the debt at the value of the notes at the date of the tender. *Meeks* v. *Davis*, 326.

24. A note, though made payable in dimes, may be discharged by a payment in any other legal coin of the United States.

Commissioners of the Atchafalaya Rail Road and Banking Co. v. *Bean*, 414.

CITATION.

1. It is not necessary that a citation should contain the name of the judge of the court from which it is issued. Art. 179 of the Code of Practice enumerates all the requisites of a citation. *Hemken* v. *Farmer*, 155.

2. The formalities prescribed by art. 254 of the Code of Practice, which requires where the defendant has no known place of residence, or conceals his person, or is absent, or resides out of the State, that the sheriff shall serve the citation by affixing a copy thereof to the door of the parish church of the place, or to that of the room where the court in which the suit is pending is held, stand in the place of citation, and form the basis on which all subsequent proceedings must rest, and their omission will be fatal. Service of citation on the defendant, is the first step to be taken.

Putnam v. *Grand Gulf Rail Road and Banking Co.*, 232.

See APPEAL, VII.

CLERK OF COURT.

It is not enough that a clerk certify the result of the action of a court; he

must make copies of what appears on the records, of which he is the keeper. *Succession of Bowles*, 33.

See EVIDENCE, 8.

CODES, ARTICLES OF, CITED, EXPOUNDED, &c.

I. *Civil Code of* 1808.
II. *Civil Code.*
III. *Code of Practice.*

I. *Code of* 1808.

Book III, Tit. II, art. 48. Donations, *inter vivos* of moveables or slaves. *Harlin* v. *Léglise*, 194.
————, arts. 210. 220. Donations by marriage contract, to husband or wife. *Ib.*
———, Tit. III, arts. 56 to 64. Interpretation of agreements. *Wells* v. *Compton*, 171.
———, Tit. V, art. 15. Donations *propter nuptias*. *Harlin* v. *Léglise*, 194.
———, Tit. XXI, art. 6. Exemption from seizure of undivided share of heir in a succession. *Noble* v. *Nettles*, 152.

II. *Civil Code.*

48. Domicil of minor, where. *Calliham* v. *Tanner*, 299.
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185. Emancipation of slaves. *Nolé* v. *De St. Romes*, 484.
219. Rights of children legitimated by marriage. *Liautaud* v. *Baptiste*, 441.
224, 257. Rights of natural children. *Ib.*
281, 282, 283. Minors—legal tutor when and how appointed. *Tutorship of Mossy*, 390.
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290, 292. Minors—duty of relations as to appointment of tutor. *Ib.*
334, 335, 336. Minors—alienation or mortgage of immoveables and slaves of. *Short* v. *Piety*, 262.
342. Minors—commissions of tutor. *Succession of Frantum*, 283.
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420. Corporations, political, defined. *McGuire* v. *Bry*, 196.
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895. Successions—representation only exists as to persons deceased. *Succession of Ludewig*, 92.
913. Rights of natural children against their father, *Liautaud* v. *Baptiste*, 441.
948. ——— legitimated by marriage. *Ib.*
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1131, 1132. Successions—right of survivor in a commercial partnership to require stock to be disposed of for common profit in ordinary course of trade. *Mathison* v. *Field*, 44.
1137. Successions—division of property after dissolution by death. *Ib.*
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1261. Successions—judicial partition, when to be made by sale. *Kohn* v. *Marsh*, 48.
1265. ——— right of heirs to purchase to amount of their portions, at sale of. *Ib.* *Succession of Carraby*, 349.
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1455. ——— *mortis causa*, defined. *Ib.*
1507. ——— substitutions and *fidei commissa* prohibited. *Liautaud* v. *Baptiste*, 441.
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2497. ——— apparent defects, not redhibitory vices. *Hivert* v. *Lacaze*, 357.
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2615. Sale or transfer of a debt includes what. *Auguste* v. *Renard*, 389. *Cantrelle* v. *Le Goaster*, 433.

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700. *Fieri facias*—when to be returned. *State* v. *Judge of Probates of St. Tammany*, 355.
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713. ————— recourse of purchaser, evicted by holder of legal or judicial mortgage, or forced to pay off the mortgage. *Ib.*
717. ————— right of purchaser to require holder of legal or judicial mortgage to discuss the property of the debtor. *Ib.*
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746. 747. ————— when to be issued on judgments of another tribunal. *Miller* v. *Gaskins*, 94.
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905. Supreme Court to pronounce judgment which should have been rendered below, when. *Succession of Carraby*, 349.
924. 925. Jurisdiction of Courts of Probates. *Succession of Ludewig*, 92. *Ib.* 99.
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944. Minor—tutor or curator, by who appointed. *Succession of Winn*, 303.

951. Minor, where mother contracts a second marriage, tutorship how conferred on her. *Tutorship of Mossy*, 390.

952. —— duty of judge where appointment of legal tutor claimed by ascending relation. *Ib.*

954, 955. —— appointment of legal tutor when conflicting claims between ascending and other relatives. *Ib.*

983. Successions—jurisdiction of Courts of Probate as to claims for money against. *Succession of Ludewig*, 92.

984. ———— claims for money against, to be presented to executor, administrator or curator, before suit. *Ib.* *Fisk* v. *Friend*, 264.

985, 986. ————, further proceedings by creditor for recovery of. *Succession of Ludewig*, 92.

989. ———— interest on claims against. *Burney* v. *Brown*, 270.

996. ———— action against, when in possession of heirs. *Porter* v. *Muggah*, 29.

1049. 1050. Appeal from Probate to Supreme Court—what amount will authorize. *Succession of Field*, 5.

COMPENSATION.

See PLEADING, V.

CONFLICT OF LAWS.

See CONTRACTS, 8.

CONFUSION.

To an action by the Commissioners, appointed under the act of 14th March, 1842, for the liquidation of a Bank, for the amount of a due bill, defendants pleaded in compensation a check in their favor, for an equal amount, drawn on the Bank by a depositor. The check was presented for payment on the 10th of March. A writ of sequestration had been issued against the Bank on the preceding day, but the judgment declaring the forfeiture of its charter was rendered on the 11th of the same month, and not signed until the 15th. *Held*, that the debts were extinguished by confusion on the 10th, when defendants, who were debtors for the amount of the due bill, became creditors for that of the check.

Commissioners of the Atchafalaya Rail Road and Banking Co. v. *Bean*, 414.

CONSTITUTION OF THE STATE, EXPOUNDED, &c.

Art. 4, sect. 6. Style of Process. *Scarborough* v. *Stevens*, 147.

CONTINUANCE.

1. In an affidavit for a continuance, on the ground of the absence of a witness,

a statement "that the witness has left the city for a few days," is equivalent to an allegation that he is expected to return at the expiration of that period, and will be sufficient. *Harrison* v. *Waymouth*, 340.

2. Where, on an application for a continuance, defendant swears, that he expects to prove by a witness, who is absent, "that plaintiffs had caused great damage to him by their illegal conduct, that he is not indebted to them, and that he cannot safely go to trial without his testimony," the circumstance of his having other witnesses to the same facts, ought not to deprive him of the benefit of a continuance; for the absent witness might have the means of speaking more positively than the others. *Ib.*

CONTRACTS.

1. Where an undertaker has not complied with the terms of his contract for the erection of a house, but his employer receives and uses it, the latter will be bound to pay for the value of the work. *Clark* v. *Kemper*, 10.

2. In an action on a joint contract, all the obligors must be made defendants, though one of them may have performed his part, or may be domiciliated in a parish beyond the jurisdiction of the court, parties contracting joint obligations being considered to waive the personal privilege of being sued before the court having jurisdiction over the place of their domicil; and the judgment must be against each defendant, separately, for his proportion.
Thompson v. *Chértien*, 26.

3. Courts of justice will not lend their aid to either party, to enforce a contract entered into for purposes reprobated by law. *Puckett* v. *Clarke*, 81. *Eastman* v. *Beiller*, 220.

4. Arts. 2080, 2082 of the Civil Code require that all the obligors in a joint contract shall be sued together, including those who may have performed their part, in order that the latter may recover back what they have paid, in case it should be determined they were not bound. The judgment for costs must be *in solido*, against those who have not performed their part.
Drew v. *Atchison*, 140.

5. In the interpretation of contracts, the intention of the parties is to be ascertained, and effect given to it, and to all the clauses of the contract. No construction is to be given which will render important expressions useless. The intention must be determined by the words of the contract, if possible; but where the intention is doubtful, the interest of the parties, or other contracts, may be referred to. Where a clause is susceptible of two interpretations, it must be understood in that sense in which it will have some effect. So, the manner in which it has been executed, or acted under, by both parties, or by one with the express or implied assent of the other, also furnishes a rule of interpretation. Finally, in doubtful cases, the construction must be against the party who has contracted the obligation.
Wells v. *Compton*, 171.

6. Where the intention of the parties to a contract is doubtful, under art. 1951 of the Civil Code, the court will inquire into the whole conduct of the parties in relation thereto. *Ib.*

7. In all actions of rescission, the party seeking relief must have offered to restore his adversary to the situation he was in before the contract.
Tippett v. *Jett*, 313.

8. Where a person in New Orleans orders, by letter, goods to be shipped to him from New York, offering to pay for them at a certain period after shipment, the contract will be governed by the laws of the latter place, where the final assent necessary to the completion of the contract was given, and the order received and executed. *Sh w* v. *Cakey*, 361.

9. The putting a debtor in default, is a condition precedent to the recovery of damages for the violation of a contract. The want of it need not be pleaded, but may be taken advantage of at any time. C. C. 1906.
Hodge v. *Moore*, 400.

10. A debt, as between the debtor and creditor, is indivisible, without the consent of both. A debtor cannot be compelled to pay his debt to a number of transferees, among whom it may please the creditor to divide it. C. C. 2107, 2149. The provisions of the twelfth chapter, of the seventh title, of the third book of the Civil Code, arts. 2612–2024, must be understood as applying only to entire debts, rights, or claims.
Cantrelle v. *Le Goaster*, 432.

11. A counter-letter, or something equivalent thereto, is the only proof admissible to establish simulation, not fraudulent, between the parties to a contract, or their representatives. Parol evidence is inadmissible.
Liautaud v. *Baptiste*, 441.

12. A legatee, representing an ancestor, and claiming under him, can have no other means of avoiding a contract than such as the ancestor possessed.
Ib.

COSTS.

See CONTRACTS, 4. MINOR, 14. SUCCESSIONS, 21.

COURTS.

I. *Supreme Court.*
II. *Courts of Probate.*
III. *District and Parish Courts.*

I. *Supreme Court.*

See APPEAL.

II. *Courts of Probate.*

1. Courts of Probate have exclusive jurisdiction of claims for money against successions administered by curators, executors, &c.; and all suits for money, pending before the ordinary tribunals, against one who dies leaving a vacant succession, must be transferred to the Court of Probates of the place where his succession is opened. *Succession of Ludewig*, 92.

2. A Court of Probate is competent to determine a question of title where it arises collaterally, and its examination becomes necessary to enable it to arrive at a correct conclusion on matters within its jurisdiction. As where, in an action against a curator for the amount of certain notes executed by the deceased, title to the notes is set up by a third party. In such a case, the Court of Probates will decide who is the real creditor of the succession

Succession of Goodrich, 100.

3. In all cases concerning minors, the judge referred to is the judge of the parish within whose jurisdiction the minors reside, if residents of the State. Act 18 March, 1809, sec. 8. *Succession of Winn*, 303.

4. The appointment of a tutor or curator to a minor, belongs to the Probate Judge of the domicil or usual place of residence of the father or mother of such minor, if either be alive. C. P. 944. *Ib.*

See 8, *infra*. SUCCESSIONS 20.

III. *District and Parish Courts.*

5. An overseer, though entitled to a privilege on the crop for the payment of his wages, cannot maintain an action against his employer in the parish in which the plantation is situated, where the domicil of the latter is in a different parish. The privilege granted by law to overseers is, like all others, an accessory to the principal obligation, and must follow it.

Hollander v. *Nicholas*, 7.

6. Art. 996 of the Code of Practice, which authorizes actions for debts due from a succession to be brought before the ordinary tribunals, where the heirs, though all or some of them be minors, are in possession of the estate, should, perhaps, be confined either to heirs absolute, or to beneficiary heirs in possession of a succession after it has been fully administered. But where a succession appears to have had but few debts, and to have been administered to a certain extent, and to have been in the possession of the widow and heirs of the deceased for several years, an action to recover a debt due by it, may be brought before the courts of ordinary jurisdiction.

Porter v. *Muggah*, 29.

7. The penalty imposed by the eighteenth section of the act of 7th June, 1806, on the owner or occupier of a plantation, for keeping slaves thereon, without a white or free colored person as manager or overseer, can only be recovered by civil action before an ordinary tribunal. The action must be brought before a Justice of the Peace, a Parish, or District Court, according to the number and amount of the fines claimed. *State* v. *Linton*, 55.

8. The first section of the act of 25th March, 1831, which provides that whenever the Parish Judge of any parish is disqualified by interest, or otherwise, to try any case in the Parish Court, that the District Court shall have jurisdiction thereof, and that the same shall be transferred by the Parish or Probate Court to the District Court, does not contemplate the transfer of all the mortuary proceedings and documents relative to any estate in which the Judge of Probates may be interested. The District Court may take cognizance of

the appointment of a curator, where the Probate Judge is interested; but it is not necessary for this purpose, that the papers relative to the succession should be removed from their proper place of deposit.

Ex parte Borden, 399.

9. On a rule upon an attorney, under the third section of the act of 27th March, 1823, to show cause why an information should not be filed against him, it is the duty of the Judge by whom the rule was granted, to decide as to the sufficiency of the cause shown. The act does not require that the Attorney General should be notified of, or take any part in this preliminary proceeding. *State* v. *Judge of First District*, 416.

See APPEAL, 14. ATTACHMENT, 4. CONTRACTS, 2. SUCCESSIONS, 20.

CURATOR.

See COURTS, 2. 8. SUCCESSIONS.

DAMAGES.

See APPEAL, XI. CONTRACTS, 9. LEASE, 3.

DEFAULT, JUDGMENT BY.

See APPEAL, 27. 28. 29.

DISCUSSION.

See PLEADING, 9. SURETY, 3. 9.

DIVISIBLE OBLIGATIONS.

See CONTRACTS, 10.

DOMICIL.

1. Where a party has repeatedly and publicly declared himself to be a resident of a particular parish, he will not be allowed, though actually residing elsewhere, to gainsay his own declarations, which may have misled others.

Commercial Bank of Natchez v. *King*, 243.

2. Where a mother, who had been confirmed as the natural tutrix of her minor children, marries a second husband domiciliated in a different parish, without having convened a family meeting to determine whether she shall be continued as tutrix, both herself and the minors will acquire immediately, by the very fact of the marriage, a domicil in the parish of the second husband. C. C. 48. *Succession of Winn*, 303.

See COURTS, 5. PLEADING, 3. 5.

DONATIONS.

I. *Donations Inter Vivos.*
II. *Donations Mortis Causa.*
III. *Donations generally.*

I. *Donations Inter Vivos.*

1. All donations *inter vivos* must be passed before a notary and two witnesses.
Brittain v. *Richardson*, 78.

2. The right of children to attack donations *inter vivos* made by their parents which exceed the disposable portion, accrues only after the death of the latter; for they might survive all their forced heirs, in which event all donations would be valid and binding. *Succession of Ludewig*, 99.

3. Donations *propter nuptias* were not excepted from the provision of art. 48, tit. 2, book 3, of the Code of 1808, that "no donation *inter vivos* of moveable property or slaves, shall be valid for any other effects than those of which an estimate, signed by the donor or donee, or by those who accept for him, is annexed to the record of the donation." The omission of the estimate, in a donation of slaves, is not cured by the delivery of the slaves.
Harlin v. *Léglise*. 194.

4. Donations *propter nuptias* are not excepted from the general rules prescribed by the Code of 1808, in relation to other donations. *Ib.*

5. The rights acquired by children legitimated by the subsequent marriage of their parents, have no effect against gratuitous dispositions previously made by the latter. The legitimation has no retroactive effect. It operates only from the date of the marriage. C. C. 219, 948, 1556.
Liautaud v. *Baptiste*, 441.

II. *Donations Mortis Causa.*

6. Posterior testaments, which do not expressly revoke prior ones, will annul such dispositions in them, as are incompatible with, contrary to, or entirely different from the provisions of the former. Thus, the appointment of one as sole executor, will annul any appointment of another executor made in a previous will. *Succession of Bowles*, 31.

7. The probate of a will is a judicial proceeding, and must be authenticated according to the act of Congress of 26th May, 1790. *Ib.* 33.

8. The certificate of the clerk of a court in another State, that the transcript "is a true copy from the original filed in my office, as proven in open court, at the October term, 1841, and ordered by the court to be recorded," is not such evidence of the testament having been duly proved, before a competent judge of the place where it was received, as will authorize its admission to probate and execution in this State. It does not show how the will was proved, nor what was the order of the court. Duly certified copies of the orders or decree in relation to the proof and recording of the will, should have accompanied the transcript of the latter. *Ib.*

9. An instrument, the real object of which was a disposition *mortis causa*, if executed without the formalities required by law to give it validity as such, can have no effect. *Brittain* v. *Richardson*, 78.

III. *Donations generally.*

10. Where donations *inter vivos* or *mortis causa*, are clothed with the formalities required by law to give them validity, the forced heirs alone can sue for their reduction, in case they exceed the disposable portion; but when void for the want of such formalities, the legitimate heirs or other representatives of the estate, as well as the forced heirs, may sue to annul them.
Brittain v. *Richardson*, 78.

11. The father of certain natural children, who had made a sale of all his property to a third person, by a subsequent marriage legitimated his children. After the death of the father, the property was sold to a fourth. In an action by the children against the latter, to recover the property on the ground that the sales were simulated, plaintiffs alleged that it was agreed between the deceased and his vendee, that, notwithstanding the sale, the former should remain the owner of the property, which should be reconveyed to him when required, or to his children in case of his death, and that the sale was in the nature a *fidei commissum*, and, as such, prohibibited by law. *Held*, that the interest of the plaintiffs, who were subsequently legitimated, not having existed at the date of the first sale, parol evidence was inadmissible to prove that it was a *fidei commissum*; that the object of the action is to enforce the *fidei commissum* complained of; and that plaintiffs cannot, under the pretext that it was a *fidei commissum*, be allowed to establish the simulation of the sale, and thereby give effect to the very agreement prohibited by law. *Liautaud* v. *Baptiste*, 441.

12. The object of the law-maker being to prevent those whom it disables from receiving donations, from secretly enjoying them, all *fidei commissa*, even those in favor of persons capable of receiving, are prohibited. C. C. 1507.
Ib.

DOTAL PROPERTY.

See Husband and Wife.

EMANCIPATION OF SLAVES.

Where a slave ordered to be emancipated by will, sues to establish her right to freedom, she must allege and prove that she is thirty years of age, or a native of the State, and that she has behaved well during the four preceding years. Act 9 March, 1807. C. C. art. 185. The act of 31st January, 1827, effected no other change in the law than to authorize, under certain circumstances, emancipation before the thirtieth year.
Nolé v. *De St. Romes*, 484.

ERROR.

See Appeal, 14. 24. Evidence, 11.

EVIDENCE.

I. *When to be Introduced.*
II. *Matters Judicially Noticed.*
III. *Interest of Witness.*
IV. *Examination of Witnesses, and Reduction of Testimony to Writing.*
V. *Commission to take Testimony.*
VI. *Judicial Records and Proceedings, and Copies thereof.*
VII. *Non-Judicial Records and other Public Instruments, and Copies thereof.*
VIII. *Private Writings.*
IX. *Admissibility of Parol Evidence under arts.* 2256 *and* 2895 *of the Civil Code.*
X. *Secondary Evidence.*
XI. *Irrelevant Evidence.*
XII. *Onus Probandi.*
XIII. *Presumption.*
XIV. *Evidence of Particular Persons.*
1. *Parties.*
2. *Attorneys at Law.*
3. *Agents.*
XV. *Evidence in Particular Actions.*
1. *On Bills of Exchange and Promissory Notes.*
2. *For Malicious Prosecution.*
3. *For Partition.*
4. *In Petitory Actions.*
5. *In Actions of Rescission.*
6. *In Proceedings by Attachment.*
2. *In Suits for Freedom.*

I. *When to be Introduced.*

1. Parties are always allowed to exercise their own judgment, as to the order of introducing their proofs. *Lynch* v. *Benton*, 106.

2. An amended petition propounding interrogatories to a party to the action, offered after the trial has commenced, will be too late.
Dabbs v. *Hemken*, 123.

3. A case will not be remanded, after appeal, on an affidavit of newly discovered evidence. The court cannot notice any thing which may have occurred subsequent to the date of the judgment appealed from.
Succession of Hamblin, 130.

4. On a rule against one who had been appointed, by consent of parties, to receive and sue for all debts due to the partnership of which plaintiff and de-

fendant were members, to show cause why he should not pay the amount so received by him into court, he may introduce evidence to show that he had paid debts due by the partnership, without first showing any authority to do so from the parties, or from either of them. A party cannot be controlled as to the order of introducing the testimony in support of his case. The authority to pay might be afterwards proved. *Kellar* v. *Williams*, 327.

II. *Matters Judicially Noticed.*

5. No evidence will be required of the official capacity of functionaries commissioned by the State. *Follain* v. *Lefevre*, 13.

III. *Interest of Witness.*

6. It is no objection to a witness that he is interested in a case, when offered to testify against his interest. *Travis* v. *January*, 227.
7. One who had signed a sequestration bond as surety for plaintiffs, but had been released before the trial, another surety having been substituted, is a competent witness for the plaintiffs. *Comstock* v. *Paie*, 440.

IV. *Examination of Witnesses, and Reduction of Testimony to Writing.*

8. Evidence, when required to be reduced to writing, must be taken down by the clerk, and should, in all cases, be read to the witness before he leaves the stand. The judge has no right, under any circumstances, to add to, or take from it, without recalling the witness. *Jonau* v. *Ferrand*, 364.
9. A broker, examined as a witness to prove the market value of certain stocks, will not be compelled to disclose the names of persons to whom he has sold shares of the same stock, where there is no intimation of any intention to examine such purchasers for the purpose of contradicting him, their names being, under such circumstances, immaterial. *Ib.*

V. *Commission to take Testimony.*

10. Art. 439 of the Code of Practice, making it the duty of the court which grants a commission to take testimony, to fix a day for its return, was intended to obviate any dispute as to the sufficiency of the time allowed for its execution, when the case should be called for trial before its return. But the neglect of the court to fix a return day, will not render the commission null. *Follain* v. *Lefevre*, 13.
11. A commission to take testimony, directed to "any one of the associate judges of the City Court of New Orleans," appeared from the record to have been executed by one *N.* Jackson. There being no associate judge of that name, on an objection to its admission, and allegation by the party that it was a clerical error for *O. P.* Jackson, an actual judge of that court: *Held*, that the record not having been corrected by *certiorari*, the error is fatal. *Ib.*

12. Where a commission to take testimony has been duly executed, and returned into court, either party may use the evidence taken under it; and this right is not waived, by omitting to cross-examine the witnesses.

Dwight v. *Linton*, 57.

13. Where the certificate of the magistrate, to whom a commission was addressed, attests that the witness appeared and answered the interrogatories, and signed his name thereto "after having been examined upon the Holy Evangelist of Almighty God," it will be sufficient. The language of such a certificate is immaterial, provided it appear clearly that the requisites of the law have been complied with. *Follet* v. *Jones*, 274.

14. The object of the 7th sect. of the act of 25th March, 1828, which requires that interrogatories to be propounded to witnesses examined under commission, shall be served on the opposite party or his counsel, three days previous to being forwarded, is to afford the latter sufficient time to examine them, and prepare his objections or cross-interrogatories; and where such interrogatories have been handed to a party, with a request that he will accept service thereof and return them the next day, and he acknowledges service, and returns them accordingly, with his cross-interrogatories, he will be considered as having waived any further delay. *Ib.*

15. As a general rule, the deposition of a witness cannot be read, if his personal attendance can be procured. *Hawkins* v. *Brown*, 310.

16. The deposition of a witness, to whom cross-interrogatories were propounded by the opposite party, having been taken *de bene esse*, and returned into court, the latter objected to its admissibility, on the ground that the witness, who was within the jurisdiction of the court, should have been produced in person. *Held*, that the depositions were inadmissible; and that it could not be inferred from the fact that no objection was made to the depositions previous to the trial, that the opposite party intended to dispense with the personal attendance of the witness. *Ib.*

VI. *Judicial Records and Proceedings, and Copies thereof.*

17. The probate of a will is a judicial proceeding, and must be authenticated according to the act of Congress of 26th May, 1790.

Succession of Bowles, 33.

18. The certificate of the clerk of a court in another State, that the transcript "is a true copy from the original filed in my office, as proven in open court, at the October term, 1841, and ordered by the court to be recorded," is not such evidence of the testament having been duly proved, before a competent judge of the place where it was received, as will authorize its admission to probate and execution in this State. It does not show how the will was proved, nor what was the order of the court. Duly certified copies of the orders or decree in relation to the proof and recording of the will, should have accompanied the transcript of the latter. *Ib.*

19. It is not enough that a clerk certify the result of the action of a court; he must make copies of what appears on the records, of which he is the keeper. *Ib.*

20. An instrument, signed by a parish judge alone, purporting to be the *procès-verbal* of the sale of real estate belonging to a succession, which recites that the sale was made in pursuance of a decree of the Court of Probates in which the succession was opened, and of the advice of a family meeting, is insufficient to establish the existence of the decree.

Beard v. *Morancy*, 119.

21. Letters of executorship, under the hand and seal of the Judge of the Court of Probates, are conclusive evidence of the facts they purport to establish; nor can the jurisdiction of the judge be inquired into collaterally.

Succession of Hamblin, 130.

22. Where the meaning of an instrument is uncertain, the record of another suit, by a different plaintiff, but to which the defendant was a party, will be admissible in evidence to show, by the acts and declarations of the latter, what his understanding of the instrument was. The present plaintiffs, not having been parties to the suit, cannot avail themselves of the statements in the pleadings as judicial admissions, absolutely conclusive of the rights of the defendant. They must be considered simply as other declarations.

Wells v. *Compton*, 171.

23. Surveyors' plats, made under the order of court, in a suit to which defendant, against whom they are offered, was a party, though the plaintiff was not, are admissible in evidence as circumstances, so far as they show acts of the defendant. *Ib.*

24. The statements of witnesses taken down in a suit, by a different plaintiff, but to which the defendant was a party, cannot, as a general rule, be received in evidence against the latter. *Aliter*, where the testimony of a witness so taken down is offered to discredit the evidence subsequently given by him; or where the declarations of a deceased surveyor are offered to explain his operations. *Ib.*

25. The record of another suit, when offered to support a plea of *res judicata*, is admissible to show what the parties claimed, and what was decided in such suit. So the record of another suit, to which the plaintiffs were parties, though joined with others and in a different capacity, is admissible against them, when offered by the defendants, who were plaintiffs in that case; the latter are entitled to the full benefit of any decision made on the rights of the parties, and to show that the plaintiffs have compromised any of their rights by that suit. *Ib.*

VII. *Non-Judicial Records and other Public Instruments, and Copies thereof.*

26. The Registers of the Land Offices of the United States, may, like all other keepers of public records, give copies or extracts from any books or documents in their custody, and such copies, when duly certified, are admissible in evidence; but they cannot attest or certify the contents of such books or documents in any other manner. *Judice* v. *Chrétien*, 15.

27. The provisions of arts. 697 and 698 of the Code of Practice, requiring the sheriff to cause the act of sale executed by him for property sold under a

fi. fa., to be recorded in the office of the clerk of the court from which the writ was issued, were designed to give to the sheriff's deed the authenticity of a notarial act, and to authorize its introduction in evidence without further proof of its execution. They do not repeal, nor in any way modify the act of the 24th March, 1810, which declares, sect. 7, that no notarial act concerning immoveable property shall have effect against third persons, until recorded in the office of the parish judge of the parish in which it is situated; nor that of 26th March, 1813, providing, sect. 1, that sales of land or slaves, under execution, shall, except between the parties, be void, unless so recorded. *Lee* v. *Darramon*, 160.

28. The act of the thirteenth of March, 1827, relative to the protest and notices to drawers and endorsers of bills and notes, does not change the general commercial law, as to the diligence to be used in serving notices of protest; it merely provides a new mode of proof of such diligence, by authorizing the notary or other officer to state in his protest, the manner in which the demand was made of the drawer, acceptor, or person by whom such order or bill was drawn or given, and, in a certificate subjoined thereto, the manner in which the notices were served or forwarded, and by making a certified copy of such protest and certificate evidence of all the matters therein stated. The provisions of this act being in derogation of the general commercial law, the mode of proof which it authorizes will be received as sufficient evidence of notice, only where the formalities it prescribes have been strictly complied with. *Duncan* v. *Sparrow*, 164.

29. Parish Surveyors are regularly appointed officers known to the law, and when dead, their declarations, taken in other suits, may be used, when necessary, as evidence to explain their acts. So plats made by a Parish Surveyor under orders of court, in a suit to which defendant was a party, are admissible, after the decease of the former, to prove the declarations of the defendant made at the time of the survey. *Wells* v. *Compton*, 171.

30. The official acts and certificates of Parish Surveyors are entitled to full faith and credit, in all of the courts of this State. *Ib.*

31. The *procés-verbal* of a survey made by a Parish Surveyor, is legal evidence of the acts which it recites, as that notice was given, that the parties attended, &c. *Ib.*

32. A power of attorney admitted to record in another State, is not "a record or judicial proceeding of any court," within the meaning of the act of Congress of twenty-sixth May, 1790. A copy of such an instrument, must be certified in the manner required by the act of twenty-seventh of March, 1804. *Reynolds* v. *Rowley*, 201.

33. In controversies between the original grantee of a tract of land, or those claiming directly under him, and one in whose favor, as assignee, the title has been confirmed by the Commissioners of the United States, the certificate in favor of the latter, and the facts recited in it, will not be evidence, but the confirmation will enure to the benefit of the party having the inchoate title. Otherwise, as to third persons showing no title. The Commissioners appointed to decide upon land titles emanating from the former sove-

reigns of Louisiana, being authorized, by different acts of Congress, to confirm inchoate titles existing at the time of the change of government, in favor of certain grantees, or *their legal representatives*, had authority, *incidentally*, to decide whether one who claimed, not as the original grantee, was entitled to a confirmation; and such confirmation, in favor of an assignee, has been uniformly regarded as entitling the latter to a patent. It is evidence against the government, and though not binding on the original grantee, or those claiming under him, is *prima facie* evidence against the rest of the world. *Thomas* v. *Turnley*, 206.

34. A document, certified by the Secretary of State of another State, under his hand and the great seal of the State, to be a correct copy of an act of the legislature, on file in his office as having been approved on a particular day, is sufficiently attested.

Commercial Bank of Vicksburg v. *King*, 243.

35. A receipt of the Receiver of Public Moneys, for the price of government lands, is sufficient evidence of title from the United States to form the basis of a petitory action—not that it is of equal dignity with a patent, but evidence of an equitable title on which the owner may recover.

Lott v. *Prudhomme*, 293.

36. The certificate of a notary, that no note signed or endorsed by a particular person, was protested by him within a certain period, is inadmissible. A notary can only certify copies of proceedings in his office; any other fact, within his knowledge, must be disclosed under oath.

Exchange and Banking Company of New Orleans v. *Boyce*, 307.

37. Under the act of Congress of 26th May, 1790, an act of the legislature of another State can only be authenticated by affixing the seal of the State thereto. *Union Bank of Maryland* v. *Freeman*, 48.

38. A copy of an act of the legislature of another State, certified to have been made "from *Liber*, I. G., one of the law records of the State, belonging to the office of the Court of Appeals," is inadmissible. A copy from the original deposited among the archives of the State, would be better evidence.

Ib.

VIII. *Private Writings.*

39. Proof of the signatures of the grantor, and of that of one of the subscribing witnesses residing in another State, is sufficient evidence of the execution of a deed *sous seign privé*. *Thomas* v. *Turnley*, 206.

IX. *Admissibility of Parol Evidence under arts.* 2256 *and* 2895 *of the Civil Code.*

40. Art. 2256 of the Civil Code, which provides, that parol evidence shall not be received against or beyond what is contained in written acts, is inapplicable to a case where the defendant offers witnesses to prove that the endorsement of a note was merely as security, and that it was to be paid out of collections to be made by him from claims due to the drawer. The

evidence neither explains, nor contradicts the written instrument, but goes to establish a collateral fact or agreement in relation to it.

Dwight v. *Linton*, 57.

41. Parol evidence is admissible to show that the vendor made known, at the time of the sale, the defects of the thing sold. *Hawkins* v. *Brown*, 310.

42. Parol evidence is admissible to prove an agreement to sell a vessel, anterior to the date of the written act of sale. *Bell* v. *Firemen's Insurance Company of New Orleans*, 423. *Bell* v. *Western Marine and Fire Insurance Co.*, 428.

43. A claim for conventional interest must be established by written proof. C. C. 2895. *Lambeth* v. *Burney*, 251.

X. *Secondary Evidence.*

44. Plaintiff offered in evidence copies of deeds taken from the records of the office of the Parish Judge, on making oath that he had inquired in vain, from all persons who were likely to have any knowledge of the matter, for the originals, which he believed had been lost or destroyed. It was shown that the deeds were more than thirty years old; that the Record of Conveyances had been regularly kept; that it was formerly the practice to give back the originals after they were recorded; and that the Parish Judge and subscribing witnesses were dead. Other circumstances tended to show that the deeds were genuine. *Held*, that the copies were properly admitted.

Thomas v. *Turnley*, 206.

XI. *Irrelevant Evidence.*

45. The admission of irrelevant testimony is no ground for remanding a case for a new trial, where its exclusion would not probably vary the result.

Ferguson v. *Whipple*, 344.

46. Instead of striking out any portion of the pleadings, a more regular course is to permit the parties to go to trial, and to reject, on the objection of the opposite party, any evidence offered to sustain such portion.

Jonau v. *Ferrand*, 364.

XII. *Onus Probandi.*

47. Where a sheriff has received a tax roll and undertaken its collection, he must show that he has used due diligence. He cannot throw upon the State, the burden of proving that he actually received the amount.

Scarborough v. *Stevens*, 147.

48. A party, who seeks to render another liable for the debt of a third person, must prove such liability beyond all doubt, or he cannot recover. C. C. 3008. *Hazard* v. *Lambeth*, 378.

XIII. *Presumption.*

49. In an action, in this State, against the endorser of a note dated at a place in this State in the parish in which the endorser resides, payable in another

State, the presumption will be, until the contrary is shown, that the note was endorsed at the place of its execution; and the obligation will be governed by the *lex loci contractus*.

Duncan v. *Sparrow—Application for Re-hearing*, 167.

50. The acknowledgment and payment by tutors, curators, and executors, of debts due from the estates administered by them, are *prima facie* evidence of their correctness. When, from the extravagance of the charges, the unnecessary character of the supplies, or from any other circumstance, bad faith or dishonesty may be presumed, courts cannot be too strict; but where there is every appearance of good faith and correct management, such fiduciaries should not be held, in the settlement of their accounts, to the strictest rules of evidence. Were they obliged to prove the signatures to every receipt, the cost of the attendance of witnesses or of their depositions, would involve the estates in heavy and unnecessary expense.

Succession of Frantum, 283.

51. Proof that the notice of protest was deposited in the post office at seven o'clock, A. M. the day after the protest, shows due diligence; and it will be presumed, in the absence of evidence to the contrary, that the notice was in time to go by the mail of that day.

Commercial Bank of Natchez v. *King*, 243.

52. Where the record does not show whether a slave sold was delivered to the vendee at the time of the adjudication, or after the execution of the notarial act, it will be presumed that the vendor retained possession until the act of sale was passed. C. C. 2588. *Hivert* v. *Lacaze*, 357.

See 56, *infra*.

XIV. *Evidence of Particular Persons.*

1. *Parties.*

53. Any consent given, or admission made on record, by a party, in the progress of a suit, from which his adversary may derive any legal right, cannot be withdrawn without the consent of the latter, who is entitled to the benefit of its full legal effect. *Aliter*, where such consent or admission confers no right, as where experts have been appointed, by consent, to ascertain a fact, in which case either party may move to rescind the order, or it may be done by the court *ex officio*. *Kohn* v. *Marsh*, 48.

54. In an action against a seizing creditor and the sheriff, in which plaintiff prayed for an injunction and damages, he cannot call upon the latter to testify as a witness. He must release him, or propound interrogatories to him as a party. *Dabbs* v. *Hemken*, 123.

55. A party to a suit, interrogated as to a particular fact, cannot, under the pretext of answering the interrogatory, annex to his answer letters of a third person, and thus introduce in evidence statements not under oath, for the purpose of influencing the jury on other points in the case.

Reynolds v. *Rowley*, 201.

56. In contests between the creditors of an insolvent, the confessions or ac-

knowledgments of the latter are not evidence. Such declarations are presumed to be fraudulent. *Blackstone* v. *His Creditors*, 219.

57. A party to a suit is not bound to answer interrogatories propounded to him by his opponent, unless ordered to do so by the court. C. P. 348.
Commercial Bank of Natchez v. *King*, 243.

58. Where a party has repeatedly and publicly declared himself to be a resident of a particular parish, he will not be allowed, though actually residing elsewhere, to gainsay his own declarations, which may have misled others.
Ib.

59. Where an action commenced by an administrator, is carried on, after the expiration of his administration, by the heirs, the defendant cannot examine him as a party, by annexing interrogatories to an amended answer. The term of his administration having expired, he has no interest in the case, and cannot be interrogated as a party. *Hawkins* v. *Brown*, 310.

2. *Attorneys at Law.*

60. An attorney cannot object, on the ground of professional confidence, to being interrogated as to the manner in which he became possessed of papers introduced by him in support of his client's cause, where it does not appear that he received them from his client or his agent.
Reynolds v. *Rowley*, 201.

61. An attorney is not admissible as a witness to disclose facts, the knowledge of which he acquired confidentially, in the practice of his profession. But when in possession of papers belonging to his client's adversary, or when called on, after having had them in his possession, to disclose what he has done within them, or to point out where they may be found, the rule does not apply; and he may be as properly called on to produce the papers necessary to establish the rights of the adverse party, if still in his possession, or interrogated as to facts which may lead to their discovery, as his client himself could be. C. P. 140, 473. *Travis* v. *January*, 227.

3. *Agents.*

62. The declarations of one who had acted as an agent, made after the termination of his agency, are not binding on the principal, though the former be dead at the time of the trial. *Reynolds* v. *Rowley*, 201.

XV. *Evidence in Particular Actions.*

1. *On Bills of Exchange and Promissory Notes.*

See BILLS OF EXCHANGE AND PROMISSORY NOTES, VI.

2. *For Malicious Prosecution.*

63. To maintain an action for a malicious prosecution, the plaintiff must prove: *first*, the prosecution; *second*, that the defendant was the prosecutor, or the cause of the prosecution; *third*, that he was actuated by malice; *fourth*, that there was no probable cause for the prosecution.
Grant v. *Deuel*, 17.

64. In an action for a malicious prosecution, malice may be established: *first*, by proving express malice; *second*, by showing want of probable cause for the prosecution. Malice is usually inferred from the want of probable cause. *Ib.*

65. It is a well settled rule of law, founded on principles of policy and convenience, that the prosecutor shall be protected, though his private motives may have been malicious, provided he had probable cause for the charge. Where express malice has been proved, there must be some positive evidence to show that the prosecution was groundless, though slight evidence will be sufficient. *Ib.*

66. An acquittal, or even subsequent proof of complete innocence, is not sufficient evidence of want of probable cause. *Ib.*

67. Proof that the jury entertained doubts on the evidence, or deliberated as to the guilt of the accused after the case was concluded, is proof of probable cause for the prosecution. *Ib.*

3. *For Partition.*

68. Petition by the syndics of an insolvent for a division of partnership property by sale. Four experts having been appointed, by consent, to report whether the property could be divided in kind, without loss or inconvenience, and two only having reported, on motion of plaintiffs the order appointing experts was rescinded, and the court proceeded to receive other evidence of the facts intended to be established by their report. *Held*, that the report of the experts was not the only mode of proof to which the court might resort, to enable it to decide whether the property should be sold; and that, under art. 1261 of the Civil Code, any other legal evidence might be received. *Kohn* v. *Marsh*, 48.

4. *In Petitory Actions.*

69. A petitory action may be maintained against a naked possessor, upon a title which, if accompanied by possession, would be regarded as a just title. *Thomas* v. *Turnley*, 206.

70. A petitory action may be defeated, by showing that the title is in a third person, or that the latter has a better title than the plaintiff. *Ib.*

71. To recover against a mere trespasser, who sets up no title in himself or in any other person, it is unnecessary that the plaintiff should show a title, perfect in all respects; one apparently good will suffice. *Baillio* v. *Burney*, 317.

5. *Actions of Rescission.*

72. In all actions of rescission, the party seeking relief must have offered to restore his adversary to the situation he was in before the contract. *Tippett* v. *Jelt*, 313.

73. Proof of an offer by the vendor to annul the sale of a slave, on the payment of a certain sum, will exonerate the plaintiff, in a redhibitory action,

from the necessity of proving a tender of the slave. The tender would have been useless, without the payment of the sum demanded.

Hivert v. *Lacaze*, 367.

74. The purchaser of a slave, to entitle himself to the benefit of the third section of the act of 2d Jan. 1834, which provides that one who institutes a redhibitory action on the ground that the slave is a runaway or thief, shall not be bound to prove that such vice existed before the sale, when discovered within two months thereafter, where such slave had not been more than eight months in the State, must show that the slave has not resided therein for eight months preceding the sale. *Smith* v. *McDowell*, 430.

75. A counter-letter, or something equivalent thereto, is the only proof admissible to establish simulation, not fraudulent, between the parties to a contract, or their representatives. Parol evidence is inadmissible.

Liautaud v. *Baptiste*, 441.

76. The father of certain natural children, who had made a sale of all his property to a third person, by a subsequent marriage legitimated his children. After the death of the father, the property was sold to a fourth. In an action by the children against the latter, to recover the property on the ground that the sales were simulated, plaintiffs alleged that it was agreed between the deceased and his vendee that, notwithstanding the sale, the former should remain the owner of the property, which should be reconveyed to him when required, or to his children in case of his death, and that the sale was in the nature of a *fidei commissum*, and, as such, prohibited by law. *Held*, that the interest of the plaintiffs, who were subsequently legitimated, not having existed at the date of the first sale, parol evidence was inadmissible to prove that it was a *fidei commissum*; that the object of the action is to enforce the *fidei commissum* complained of; and that plaintiffs cannot, under the pretext that it was a *fidei commissum*, be allowed to establish the simulation of the sale, and thereby give effect to the very agreement prohibited by law. *Ib.*

6. *In Proceedings by Attachment.*

77. The subsequent return of a party, whose property had been attached on an affidavit that he had left the State for the purpose of never returning, will not alone be sufficient ground for dissolving the writ, where circumstances render it probable that his original intention was not to return. The intention of returning should have been clearly proved, to entitle the defendant to a dissolution of the attachment. *Reeves* v. *Comly*, 363.

7. *In Suits for Freedom.*

78. Where a slave ordered to be emancipated by will, sues to establish her right to freedom, she must prove that she is thirty years of age, or a native of the State, and that she has behaved well during the four preceding years. Act 9 March, 1807. C. C. art. 185. The act of 31st January, 1827, effected

no other change in the law than to authorize, under certain circumstances, emancipation before the thirtieth year. *Nolé* v. *De St. Romes*, 484.

See APPEAL, 29. 30. 32. CONTINUANCE.

EXCEPTION.

See PLEADING, IV.

EXCEPTIONS, BILL OF.

A bill of exceptions is only necessary, where something is to be brought to the knowledge of the appellate court, which would not otherwise appear in the record. *Harrison* v. *Waymouth*, 340.

EXECUTOR.

See EVIDENCE, 21. SUCCESSIONS.

EXECUTORY PROCESS.

1. The provisions of the Code of Practice, art. 746, *et seq.*, authorizing summary process to enforce judgments rendered in other States or in foreign countries, instead of the ordinary action on the record, which was formerly the only mode of proceeding, must be strictly pursued; and the party resorting to it must show, that he comes clearly within the law, not in appearance only, but in reality. *Miller* v. *Gaskins*, 94.
2. Defendant having procured an order of seizure and sale, on a judgment rendered in another State, against the plaintiff, a resident of Louisiana, under process of arrest, the latter enjoined the proceeding, alleging that, though it appears from the record an answer was put in for him by an attorney, that no one was authorized to appear for him, and that he never appeared or defended the action. On a motion to dissolve, on the ground that the facts alleged, though true, are insufficient to maintain the injunction; *Held*, that admitting the allegations of the petition to be true, the judgment can have no greater effect than one rendered, after personal service, but without appearance, on a judgment by default; and that the motion should have been overruled. *Ib.*
3. Defendant having obtained a judgment against plaintiff in another State, levied an execution on property of the latter in that State, the sale of which was deferred for twelve months, in consequence of not bringing two-thirds of its appraised value. Defendant, thereupon, procured an order of seizure and sale in this State, which plaintiff enjoined. On the trial, the injunction was maintained until the succeeding term, reserving to the parties the right to show whether the judgment had been satisfied out of the property originally seized, or the remedy exhausted. On an appeal by defendant: *Held*, that it is oppressive to carry on two executions at the same time, and that the judgment should be affirmed. *Newell* v. *Morton*, 102.

4. Where the the sheriff's deed for immoveable property sold under a *fi. fa.*, subject to a previous mortgage, has not been recorded in the office of the parish judge of the parish in which the property is situated, it will be without effect as to the hypothecary creditor, who may seize and sell the same as if in possession of the original debtor. *Lee* v. *Darmon*, 160.

5. Defendants having obtained a judgment against plaintiff in a Circuit Court in another State, procured an order of seizure and sale in this. Subsequently to the order of seizure, plaintiff obtained an injunction from the Chancellor of the State in which the original judgment was rendered, staying its execution until the further order of court. On an application to enjoin the order of seizure and sale: *Held*, that the injunction should be maintained until the termination of the chancery proceedings on the original judgment. *Bien* v. *Loftus*, 163.

See MORTGAGE.

EXPERTS.

See PARTNERSHIP, 3. PLEADING, 26.

FAMILY MEETING.

See MINOR, 3. 4. 9. 13.

FATHER AND CHILD.

1. Illegitimate children, though duly acknowledged, have no claim against the estate of their natural father, but for alimony. C. C. 224, 257, 913. *Liautaud* v. *Baptiste*, 441.

2. The rights acquired by children legitimated by the subsequent marriage of their parents, have no effect against gratuitous dispositions, previously made by the latter. The legitimation has no retroactive effect. It operates only from the date of the marriage. C. C. 219, 948, 1556. *Ib.*

FIDEI-COMMISSUM.

See DONATIONS, 11. 12.

FIERI FACIAS.

I. *Form of Writ.*
II. *Execution may be taken out by who.*
III. *Several Executions at the same time.*
IV. *Of the Seizure.*
V. *Privilege acquired by Seizure.*
VI. *Sale of Things Seized.*
VII. *Execution will be stayed, when.*

I. *Form of Writ.*

1. No particular form is prescribed by law for a warrant or execution, on behalf of the State, against a delinquent tax collector. A writ signed by the Treasurer, commanding the proper officer, "in the name of the State of Louisiana," is a sufficient compliance with the provision of sect. 6, art. 4, of the State constitution, in regard to the style of process.

Scarborough v. *Stevens*, 147.

II. *Execution may be taken out by who.*

2. One who has paid the debt due to a plaintiff, and been expressly subrogated to his rights, may take out execution against the defendant.

King v. *Dwight*, 2.

III. *Several Executions at the same time.*

3. A second *fi. fa.* cannot be issued on a judgment, until the first is returned.

State v. *Judge of Probates of St. Tammany*, 355.

See Executory Process, 3.

IV. *Of the Seizure.*

4. Where sufficient property could not be found, or has not been seized to satisfy an execution, a further seizure may be made when the deficiency is discovered, or other property found. Where more property has been seized than sufficient, the remedy is pointed out by arts. 652 and 653 of the Code of Practice. Such an over seizure will not authorize an injunction.

Dabbs v. *Hemken*, 123.

5. Under a judgment against a husband and wife, *in solido*, the sheriff may levy on the separate property of either. *Smallwood* v. *Pratt*, 152.

6. Under art. 647 of the Code of Practice, the undivided share of an heir in a succession, may be seized and sold under execution.

Noble v. *Nettles*, 152.

7. It is not necessary that it should be shown that any attempt has been made to seize moveables, immoveables, or slaves, before seizing the rights and credits of the debtor. The property must be pointed out by the latter, or, under art. 649 of the Code of Practice, by allowing the sheriff to execute the writ, without exercising his right of pointing out the property to be seized, he will lose it. *Ib.*

8. Plaintiffs having obtained a judgment against the defendants, seized, under a *fi. fa.*, all the rights, credits, money, and other property of defendants, in the hands, or under the control of the Receiver of Public Moneys at New Orleans. A draft from the Commissioner of the General Land Office on the Receiver, in favor of one of the defendants, was presented for payment after the seizure, which was not accepted, there not being, at the time, sufficient funds in the hands of the Receiver. The draft was subsequently given up by the holder, and the instructions to pay it revoked. On a rule on the Receiver, to show cause why he should not pay over the money in his hands

be'onging to defendant. *Held*, that the Receiver had no funds belonging to the defendant; that the money belonged to the United States, and until paid over remained under the control of the government: that the mere order to pay, did not, of itself, transfer to the defendant any money in the hands of the Receiver, but was, at most, only an acknowledgment of the debt.

Mechanics and Traders Bank of New Orleans v. *Hodge*, 373.

9. A rule cannot be taken on an officer of the United States, in his official capacity, to show cause why he should not pay over money, seized in his hands under a *fi. fa.*, as the property of a third person. To condemn him to pay as an officer, would be to condemn the government, which cannot be done. *Ib.*

V. *Privilege acquired by Seizure.*

10. Under art. 729 of the Code of Practice, the creditor acquires, by the mere act of seizure, a privilege on the immoveable or moveable property seized, which entitles him to a preference over other creditors, unless the debtor has been declared a bankrupt previous thereto. If the seizure created a privilege only where the property of the debtor was sufficient to pay all his debts, it would only attach when it would be useless.

Campbell v. *His Creditors*, 106.

11. Art. 301 of the Code of Practice, which declares that the "sheriff may be enjoined from paying the claim of the plaintiff out of the proceeds of the sale of the property seized, if a third person oppose such payment, alleging that the defendant has no other property to pay his debts, and pray that the proceeds may be brought into court, to be distributed among all the creditors of the defendant according to the order of their respective privileges or hypothecations," makes a provision in favor of the creditors who have a *higher privilege* than that of the seizing creditor. It directs the proceeds to be divided among the creditors according to their respective privileges and hypothecations, including the privilege obtained by the seizure. *Ib.*

VI. *Sale of Things Seized.*

12. The circumstance, that the sale of property seized under execution was advertised before the expiration of the three days allowed for notice of the seizure, is immaterial. *Dabbs* v. *Hemken*, 123.

13. A slight variance between the description of the property in the advertisement, and that in the notice of seizure, which cannot mislead the debtor, is immaterial. *Ib.—Re-hearing*, 129.

14. The second section of the act of 20th March, 1816, requires that the property of a delinquent sheriff, which has been seized under execution issued by the Treasurer of the State, shall be sold for cash, and without appraisement. *Scarborough* v. *Stevens*, 147.

15. The purchaser of property sold under a *fi. fa.* on twelve months' credit, having offered defendants' testator to the sheriff as security for the price, received a blank bond from the sheriff to be signed by himself and the testator, and filled up on its return. The bond was signed, but not returned to

the sheriff, till after the death of the surety, which happened a few days after he signed the instrument, when it was filled up. *Held*, that the security having been previously approved by the sheriff, the contract was complete by the signature of the former. *Wells* v. *Moore*, 156.

16. In a sale under execution, on a twelve months' credit, the sheriff is the agent of the party for whose benefit the sale is made, in taking bond from a purchaser. He is liable to the former if he accept insufficient, and to the latter if he refuse sufficient surety; and is, therefore, the proper judge of its sufficiency. *Ib.*

17. The provision of arts. 697 and 698 of the Code of Practice, requiring the sheriff to cause the act of sale executed by him for property sold under a *fi. fa.*, to be recorded in the office of the clerk of the court from which the writ was issued, were designed to give to the sheriff's deed the authenticity of a notarial act, and to authorize its introduction in evidence without further proof of its execution. They do not repeal, nor in any way modify the act of the 24th March, 1810, which declares, sect. 7, that no notarial act concerning immoveable property shall have effect against third persons, until recorded in the office of the parish judge of the parish in which it is situated; nor that of 26th March, 1813, providing sect. 1, that sales of land or slaves, under execution, shall, except between the parties, be void unless so recorded. *Lee* v. *Darramon*, 160.

18. Where the sheriff's deed for immoveable property sold under a *fi. fa.*, subject to a previous mortgage, has not been recorded in the office of the parish judge of the parish in which the property is situated, it will be without effect as to the hypothecary creditor, who may seize and sell the same as if in possession of the original debtor. *Ib.*

19. A sheriff has a right to retain possession of property sold by him, during the pendency of a rule to show cause why the sale should not be set aside. *Bayon* v. *Breedlove*, 383.

VII. *Execution will be stayed, when.*

20. Where different seizures have been made in the hands of defendant, of whatever sums may be due by him to plaintiff, on a judgment in favor of the latter, execution will be stayed until the seizures are proved to have been satisfied or abandoned. No law authorizes a judgment ordering the amount to be deposited in court, subject to the claims of the seizing creditors. *Rightor* v. *Slidell*, 375.

FRAUD.

See HUSBAND AND WIFE, 2. SALE, VI.

HUSBAND AND WIFE.

1. Under a judgment against a husband and wife, *in solido*, the sheriff may levy on the separate property of either. *Smallwood* v. *Pratt*, 132.

2. The husband, as the head of the community, has a right to alienate its

property. When done collusively, for the purpose of injuring the wife, she has her remedy against his heirs, after his death, under art. 2373 of the Civil Code, and, perhaps, after a separation from bed and board. *Ib.*

3. Donations *propter nuptias* were not excepted from the provision of art. 48, tit. 2, book 3, of the Code of 1808, that "no donation *inter vivos* of moveable property or slaves, shall be valid for any other effects than those of which an estimate, signed by the donor or donee, or by those who accept for him, is annexed to the record of of the donation." The omission of the estimate, in a donation *of* slaves, is not cured by the delivery of the slaves. *Harlin* v. *Léglise*, 194.

4. Donations *propter nuptias* are not excepted from the general rules prescribed by the Code of 1808, in relation to other donations. *Ib.*

5. A wife has a privilege on the moveables of her husband, for her dotal, but not for her paraphernal property. For the latter, she has only a tacit or legal mortgage, on his immoveables. C. C. 2367, 3182. *Stafford* v. *Dunwoodie*, 276.

6. Defendant having seized under a *fi. fa.* certain moveables belonging to the husband of the plaintiff, the latter procured an injunction, pending which she obtained a judgment against her husband in a suit for separation of property, and, in virtue thereof, caused the moveable property, previously seized by defendant, to be sold, and purchased it herself, crediting the amount upon her judgment. On a motion to dissolve the injunction: *Held*, that by his seizure defendant had acquired a privilege on the moveables seized; that the rights of the wife, being merely paraphernal, gave her no privilege on the moveables; and that having, by the effect of her seizure, disabled the defendant from enforcing his privilege, she was responsible in damages for the injury he sustained from her act. *Ib.*

7. Real property purchased during the existence of the community of *acquêts*, but conveyed to the wife, will be liable for debts contracted by the husband unless proved to have been paid for out of the paraphernal funds of the former. *Marshall* v. *Mullen*, 328.

8. A married woman, who is a public merchant, may bind herself for any thing relative to her trade, without being empowered by her husband; and in such a case, if there be a community of *acquêts*, the husband will be also bound. C. C. 128. Otherwise, if not a public merchant. *Thorne* v. *Egan*, 329.

9. The authorization of the husband to the commercial contracts of the wife, is presumed by law, whenever he permits her to trade in her own name. C. C. 1779. *Ib.*

10. The wife cannot deprive the husband of the right to administer her dowry. He administers it for his own account, and not as her agent, and is not accountable to her for the profits or revenues derived from it. C. C. 2329, 2330. His obligations are those of an usufructuary. C. C. 2344. Debts contracted by him, during the marriage, as administrator of the dowry, are personal to him, and cannot bind the wife, if she renounce the community. C. C. 2379. *Ib.*

HYPOTHECARY ACTION.

See Executory Process.

ILLEGITIMATE CHILDREN.

See Evidence, 76. Father and Child.

IMMOVEABLES.

A railway is not an immoveable, either by nature or destination, when the soil on which it is laid belongs to another; it is, consequently, not affected by judicial or legal mortgages, nor susceptible of being mortgaged unless authorized by a special act of the legislature.

State v. *Mexican Gulf Railway Company*, 513.

IMPROVEMENTS.

See Accession.

INDICTMENT.

See Appeal, 2.

INJUNCTION.

1. The discovery, since the final decision of the appellate court, of new evidence tending to establish allegations in the original petition, is no ground for enjoining the execution of the judgment. The matter is *res judicata*.

Campbell v. *Briggs*, 110.

2. The trial of an injunction is a summary proceeding, in which neither party is entitled to a jury. *Dabbs* v. *Hemken*, 123.

3. Where sufficient property could not be found, or has not been seized to satisfy an execution, a further seizure may be made when the deficiency is discovered, or other property found. Where more property has been seized than sufficient, the remedy is pointed out by arts. 652 and 653 of the Code of Practice. Such an over seizure will not authorize an injunction. *Ib.*

4. A proper construction of the third section of the act of the 25th March, 1831, will not authorize the court, on dissolving an injunction, to increase the interest, where the original judgment bears interest at ten per cent a year. Whatever else it may be proper to allow, must be in the form of damages. *Ib.*

5. An execution cannot be enjoined, on grounds which might have been pleaded in defence before judgment. *Benton* v. *Roberts*, 224.

6. An injunction will not lie to stay the execution of a judgment for the amount of a note given for the price of a tract of land, on the allegation, that since the rendering of the judgment, plaintiff has discovered that the defendant, his vendor, had no title to the land. The execution can only be

resisted by appeal, or action of nullity, or on an allegation of extinguishment by payment, release, confusion, novation, or other legal mode.

Morrison v. *Crooks*, 273.

7. A party against whom an order of seizure and sale had been issued, presented a petition alleging that the mortgage and notes were obtained by fraud, and that the mortgage was illegally executed, and praying for an injunction, for a judgment rescinding the act, for damages against the mortgagee and a third person alleged to have been concerned in the fraud, and for a trial by jury. The mortgagee answered, praying that the injunction might be dissolved, the demand rejected, and for a judgment in his favor for the amount of his debt. *Held*, that the causes of opposition not being confined to those enumerated in art. 739 of the Code of Practice, and the proceedings having been changed from the *via executiva* to the *via ordinaria*, the mortgagee must be considered as a defendant in the proceedings to obtain the injunction; and that the other party, like other plaintiffs, was entitled to open and close the argument. *Beaulieu* v. *Furst*, 345.

See Appeal, 3. Executory Process, 2. 3. 5.

INSOLVENCY.

1. Under art. 722 of the Code of Practice, the creditor acquires, by the mere act of seizure, a privilege on the immoveable or moveable property seized, which entitles him to a preference over other creditors, unless the debtor has been declared a bankrupt previous thereto. If the seizure created a privilege only where the property of the debtor was sufficient to pay all his debts, it would only attach when it would be useless.

Campbell v. *His Creditors*, 106.

2. Art. 301 of the Code of Practice, which declares that the "sheriff may be enjoined from paying the claim of the plaintiff out of the proceeds of the sale of the property seized, if a third person oppose such payment, alleging that the defendant has no other property to pay his debts, and pray that the proceeds may be brought into court, to be distibuted among all the creditors of the defendant, according to the order of their respective privileges or hypothecations," makes a provision in favor of the creditors who have a *higher privilege* than that of the seizing creditor. It directs the proceeds to be divided among the creditors according to their respective privileges and hypothecations, including the privilege obtained by the seizure. *Ib.*

3. In contests between the creditors of an insolvent, the confessions or acknowledgments of the latter are not evidence. Such declarations are presumed to be fraudulent. *Blackstone* v. *His Creditors*, 219.

4. A debtor who, being unable to pay all his debts at the moment, transacts with his creditors and obtains from them a delay, is not an insolvent. The concession of a respite is based upon the supposed solvency, or eventual ability of the applicant to pay all his debts. The laws relative to respite are not insolvent laws. *Rasch* v. *His Creditors*, 407.

5. A creditor of an insolvent, in whose favor a judgment has been rendered,

on a tableau of distribution, securing him a privilege or mortgage, must be made a party to any appeal, taken by another creditor, or the syndic, for the purpose of reversing such judgment. *Garcia &c.* v. *Their Creditors*, 436.

See PARTNERSHIP, 3.

INSURANCE.

1. Where a policy of insurance provides that, "in case the insured have any other insurance against loss by fire on the property, not notified to the insurers, nor mentioned in or endorsed upon the policy, or shall afterwards make any other insurance thereon, and shall not, with all reasonable diligence, give notice thereof, and have the same endorsed on the policy, or acknowledged in writing, the policy shall be void," proof that another policy was obtained on the property, which was not notified to the insured, will discharge the latter from all liability.

Battaille v. *Merchants Insurance Company of New Orleans*, 384.

2. Where one of the conditions of a policy against fire requires, as part of the preliminary proof, without which no recovery can be had, a declaration under oath, "whether any, and what other insurance has been made on the same property," the insured will forfeit his right to recover by failing to comply with the condition. *Ib.*

3. One who has agreed to sell a vessel, but has neither delivered it nor received the price, has an insurable interest, the vessel being still at his risk. *Bell* v. *Firemen's Insurance Company of New Orleans*, 423. *Bell* v. *Western Marine and Fire Insurance Co.*, 428.

4. To entitle a party to recover on a policy of insurance, he must have had an interest in the thing insured at the time of the loss, as well as at the date of the insurance; and the character of this interest cannot be changed, between the date of the insurance and that of the loss, without the assent of both parties. *Ib.*

5. Plaintiffs, owners of a policy of insurance on freight, finding their port of destination in a state of blockade, abandoned the voyage, and returned without insisting upon receiving their freight. There was a provision in the policy that, "the assured shall not abandon in consequence of the port of destination being blockaded, but the vessel shall, in such case, have liberty to proceed to another port not blockaded, and there end the voyage, or wait a reasonable time for the blockade of the original port of destination to be raised." In an action for the amount of the policy: *Held*, that this clause did not authorize the owners to break up the voyage; and implied nothing more than a consent, on the part of the insurers, to take the risk of proceeding to another port, or of waiting a reasonable time for the blockade to be raised. *Marks* v. *Lousiana State Marine and Fire Insurance Co.*, 454.

INTEREST.

1. A claim for conventional interest must be established by written proof. C. C. 2895. *Lambeth* v. *Burney*, 254.

2. In an action, on an open account, against the heirs amongst whom a succession has been partitioned, for articles furnished to their ancestor, interest will be allowed from judicial demand, and not from the death of the ancestor. *Burney* v. *Brown*, 270.

3. When the rate of interest to be charged by a Bank on loans or discounts is limited by its charter, it cannot stipulate for a higher rate on the amount of any loan or discount, in consideration of its forbearance to sue.
Exchange and Banking Company of New Orleans v. *Boyce*, 307.

4. An account bears interest from its liquidation; and will be considered as liquidated from the time when it was rendered, if not objected to within a reasonable period. *Shaw* v. *Oakey*, 361.

5. Where in a sale of goods a time for payment is fixed, an agreement to pay interest may be implied. *Ib.*

6. An unliquidated account bears interest from judicial demand. *Ib.*

7. A payment cannot be imputed to the reduction of the principal, where any interest is due. C. C. 2160. *Ib.*

See PLEADING. 30.

INTERPRETATION.

1. Where the meaning of an instrument is uncertain, the record of another suit, by a different plaintiff, but to which the defendant was a party, will be admissible in evidence to show, by the acts and declarations of the latter, what his understanding of the instrument was. The present plaintiffs, not having been parties to the suit, cannot avail themselves of the statements in the pleadings as judicial admissions, absolutely conclusive of the rights of the defendant. They must be considered simply as other declarations.
Wells v. *Compton*, 171.

2. In the interpretation of contracts, the intention of the parties is to be ascertained, and effect given to it, and to all the clauses of the contract. No construction is to be given which will render important expressions useless. The intention must be determined by the words of the contract, if possible; but where the intention is doubtful, the interest of the parties, or other contracts, may be referred to. Where a clause is susceptible of two interpretations, it must be understood in that sense in which it will have some effect. So, the manner in which it has been executed, or acted under, by both parties or by one, with the express or implied assent of the other, also furnishes a rule of interpretation. Finally, in doubtful cases, the construction must be against the party who has contracted the obligation. *Ib.*

3. Where the intention of the parties to a contract is doubtful, under art. 1951 of the Civil Code, the court will inquire into the whole conduct of the parties in relation thereto. *Ib.*

4. In all surveys, courses and distances must yield to natural and ascertained objects. *Ib.*

5. Where a mortgage recites, that the mortgagor wishes to place the mortgagee "*à l'abri de ses avances d'argent, et des effets des endossemens que*

celui-ci voudra bien lui fournir," it will be considered as having been given to secure past, as well as future advances. *Succession of De Armas*, 342.

6. Acts granting mortgages will, in cases of doubt, be strictly construed. *Ib.*

INTERROGATORIES.

See EVIDENCE.

INTERVENTION.

See APPEAL, 17.

JOINT OBLIGATIONS.

See SURETY.

JOINT OWNERS.

See AGENCY, 2. 3.

JUDGMENT.

1. The provisions of the Code of Practice, art. 746, *et seq.*, authorizing summary process to enforce judgments rendered in other States or in foreign countries, instead of the ordinary action on the record, which was formerly the only mode of proceeding, must be strictly pursued; and the party resorting to it must show, that he comes clearly within the law, not in appearance only, but in reality. *Miller* v. *Gaskins*, 94.

2. Defendant having procured an order of seizure and sale, on a judgment rendered in another State against the plaintiff, a resident of Louisiana, under process of arrest, the latter enjoined the proceeding, alleging that, though it appears from the record an answer was put in for him by an attorney, that no one was authorized to appear for him, and that he never appeared or defended the action. On a motion to dissolve, on the ground that the facts alleged, though true, are insufficient to maintain the injunction: *Held*, that admitting the allegations of the petition to be true, the judgment can have no greater effect than one rendered, after personal services, but without appearance, on a judgment by default; and that the motion should have been overruled. *Ib.*

3. Letters of executorship, under the hand and seal of the Judge of the Court of Probates, are conclusive evidence of the facts they purport to establish; nor can the jurisdiction of the judge be inquired into collaterally. *Succession of Hamblin*, 130.

4. Where in an action against sureties who are bound jointly only, they claim in their answer the benefit of division, and it is not alleged that either is insolvent, the judgment must be against each for his virile portion. *McGuire* v. *Bry*, 296.

5. Where the case requires that a judgment should be rendered for the plain-

tiff, directing him to be put in possession of the land sued for, on paying a sum to the defendant for his improvements, the court will order, at the instance of the latter, that he be authorized to take out execution for the amount decreed to him, if not paid within a certain time.

Milliken v. *Rowley*, 253.

6. By the laws of Mississippi, the forfeiture of a forthcoming bond extinguishes the original judgment; and the forfeited bond itself acquires the force and effect of a new judgment. *Briggs* v. *Spencer*, 265.
7. In an action on a judgment obtained in Mississippi, defendant having established that the judgment had been extinguished by the execution and forfeiture of a forthcoming bond: *Held*, that there must be judgment as in case of nonsuit. *Ib.*
8. Where by the laws of a State in which a judgment has been obtained, no execution can be issued against the property of the defendant for a certain period, plaintiffs cannot, by suing on the judgment here, proceed against his property in this State, before the expiration of the delay to which defendant had acquired a right. The judgment cannot have a greater effect extra-territorially, than in the State in which it was rendered. *Ib.*
9. The appointment of a tutor by a Court of Probates, can be set aside only by appeal, or by an action of nullity. Its legality cannot be inquired into collaterally. *Succession of Winn*, 303.
10. Where different seizures have been made in the hands of defendant, of whatever sums may be due by him to plaintiff, on a judgment in favor of the latter, execution will be stayed until the seizures are proved to have been satisfied or abandoned. No law authorizes a judgment ordering the amount to be deposited in court, subject to the claims of the seizing creditors.

Rightor v. *Slidell*, 375.

See Res Judicata.

JUDGMENT BY DEFAULT.

See Appeal, 27. 28. 29.

JUDGMENT INTERLOCUTORY.

See Appeal, 3.

JURY.

1. The verdict of a jury must always be understood with reference to the pleadings, and as responsive to the issues made by them.

Downes v. *Scott*, 84.

2. The verdict of a jury will not be disturbed, unless clearly wrong.

McCoy v. *Hunter*, 119. *Hughes* v. *Lee*, 429.

3. The trial of an injunction is a summary proceeding, in which neither party is entitled to a jury. *Dabbs* v. *Hemken*, 123.

4. Jurors are so far the judges of the law as well as of the facts, that they have a right, in all cases, to find a general verdict. But the court, if not satisfied therewith, may grant a new trial. *Thomas* v. *Turnley*, 206.

5. To entitle a defendant to a trial by jury, under the 24th section of the act of 20th March, 1839, he must show, by his affidavit, that his means of defence are certain and unequivocal, and that they will affect the plaintiff's right to recover. *Smith* v. *Scott*, 258.

6. A prayer for a trial by jury, by one of two or more debtors bound *in solido*, will not enure to the benefit of those who have not joined therein. *Mulhollan* v. *Henderson*, 297.

7. Objections to a verdict lose much of their weight when not made before the court which tried the case originally. A case will be less readily remanded on a question of fact, where a new trial has not been moved for below. An appeal from the judgment of an inferior tribunal, founded on a verdict, should only be taken after the refusal of a new trial. *Hughes* v. *Lee*, 429.

JUSTICE OF THE PEACE.

See COURTS, 7.

LEASE.

1. A lessor is bound to keep the premises in a condition fit for the purposes for which they were leased. If he fail to make the repairs necessary during the lease, the tenant may make them himself, and deduct the amount from the rent. *Perrett* v. *Dupré*, 52.

2. The lessor is bound to indemnify the lessee, for all the damage sustained by the latter in consequence of the vices and defects of the thing leased, though the lessor knew nothing of the existence of such vices and defects at the time of the lease, and even where they have arisen since. *Ib.*

3. Where, after the commencement of a lease, the house becomes so much injured as to be incapable of being rendered fit for the purposes for which it was leased, otherwise than by rebuilding it, and the lessor offers to dissolve the lease, which the lessee refuses, and continues to occupy the building: *Held*, that the lessor will not be responsible for any damage subsequently sustained by the lessee in consequence of the condition of the building, and that the latter will not be entitled to claim any diminution of the rent for the period he continued to occupy the premises after the offer of the lessor to annul the lease. *Ib.*

4. In an action for the rent of a building occupied as a shop by a commercial partnership, the judgment must be against the lessees *in solido*. *Ib.*

LITISPENDÉNCIA, EXCEPTION OF.

See PLEADING, 10. 11.

LOST WRITINGS.

See EVIDENCE, X.

MALICIOUS PROSECUTION.

1. To maintain an action for a malicious prosecution, the plaintiff must prove: *first*, the prosecution; *second*, that the defendant was the prosecutor, or the cause of the prosecution; *third*, that he was actuated by malice; *fourth*, that there was no probable cause for the prosecution. *Grant* v. *Deuel*, 17.
2. In an action for a malicious prosecution, malice may be established: *first*, by proving express malice: *second*, by showing want of probable cause for the prosecution. Malice is usually inferred from the want of probable cause. *Ib.*
3. It is a well settled rule of law, founded on principles of policy and convenience, that the prosecutor shall be protected, though his private motives may have been malicious, provided he had probable cause for the charge. Where express malice has been proved, there must be some positive evidence to show that the prosecution was groundless, though slight evidence will be sufficient. *Ib.*
4. An acquittal, or even subsequent proof of complete innocence, is not sufficient evidence of want of probable cause. *Ib.*
5. Proof that the jury entertained doubts on the evidence, or deliberated as to the guilt of the accused after the case was concluded, is proof of probable cause for the prosecution. *Ib.*

MEXICAN GULF RAILWAY.

The act of 12th March, 1838, authorizing certain loans to be made to the Mexican Gulf Railway Company, and other Companies, does not, of itself, create a mortgage on the property of those Companies, nor could it without their consent. That consent is expressed by the acts of mortgage, executed in pursuance of it. The act contains only a proposition to loan, upon the execution of a mortgage on the property of the Company; when accepted, the mortgage exists, and is essentially conventional. The act did not contemplate taking a general mortgage on all the property of the Company, present and future. *State* v. *Mexican Gulf Railway Co.*, 513.

MINORS.

1. Heirs of age can accept a succession simply, or do acts rendering themselves unconditionally liable. Minors are necessarily beneficiary heirs. *Porter* v. *Muggah*, 29.
2. The fact that a party was a minor at the time that a judgment was rendered against him, and that his tutor did not attend to, or understand his rights, or take the necessary pains to procure the testimony to establish them, will not entitle him to relief, though it be proved that a different judgment must have been rendered had the proper testimony been produced in the first instance. The first judgment is *res judicata*. *Towles* v. *Conrad*, 69.

3. The advice of a family meeting is not necessary, to authorize the institution of a suit by a tutor to recover real estate belonging to his ward.
Beard v. *Morancy*, 119.

4. The decree of the Court of Probates where the succession is opened, made in conformity to the advice of a family meeting, is necessary to authorize the sale of property belonging to minor heirs; and where such a decree has been made. the court will not look beyond it. *Ib.*

5. Property of certain minor heirs having been sold by the parish judge, was afterwards seized under an execution by a creditor of the purchaser. The tutor of the heirs opposed the payment of the proceeds of the sale to the creditor, claiming a vendor's privilege for the price yet due, and setting up a mortgage given to secure the payment. In an action subsequently commenced by him, on behalf of the minors, against the syndic of the purchaser, to recover the land: *Held*, that his opposition to the payment of the proceeds to the seizing creditor, could not preclude the minor heirs from claiming the land itself. *Ib.*

6. The acknowledgment and payment by tutors of debts due from the estates administered by them, are *prima facie* evidence of their correctness. When, from the extravagance of the charges, the unnecessary character of the supplies, or from any other circumstance, bad faith or dishonesty may be presumed, courts cannot be too strict; but where there is every appearance of good faith and correct management, such fiduciaries should not be held, in the settlement of their accounts, to the strictest rules of evidence. Were they obliged to prove the signatures to every receipt, the cost of the attendance of witnesses or of their depositions, would involve the estates in heavy and unnecessary expense. *Succession of Frantum*, 283.

7. The relations of a minor, who, under arts. 290, 292 of the Civil Code, are bound to cause a tutor to be appointed to them, are authorized, and, perhaps, bound to oppose an appointment when illegally made.
Succession of Winn, 303.

8. The appointment of a tutor by a Court of Probates, can be set aside only by appeal, or by an action of nullity. Its legality cannot be inquired into collaterally. *Ib.*

9. Where a mother, who had been confirmed as the natural tutrix of her minor children, marries a second husband domiciliated in a different parish, though without having convened a family meeting to determine whether she shall be continued as tutrix, both herself and the minors will acquire immediately, by the very fact of the marriage, a domicil in the parish of the second husband. C. C. 48. *Ib.*

10. In all cases concerning minors, the judge referred to is the judge of the parish within whose jurisdiction the minors reside, if residents of the State. Act 18 March, 1809, sec. 8. *Ib.*

11. The appointment of a tutor or curator to a minor, belongs to the Probate Judge of the domicil or usual place of residence of the father or mother of such minor, if either be alive. C. P. 944. *Ib.*

12. No legal tutor can be appointed to a minor, unless both the father and mother of the minor be dead. C. C. 281. *Tutorship of Mossy*, 390.

13. Where a mother, the natural tutrix of her minor children, forfeits her tutorship by marrying a second time, without having previously convoked a family meeting to determine whether she shall continue as tutrix, and is reappointed by the judge, under the advice of a family meeting, she will hold the appointment as a dative tutrix. C. P. 951. *Ib.*

14. Where the proceedings in a contest, relative to the tutorship of a minor, have had no other object than to ascertain which of the parties was legally entitled to the appointment, neither having any personal interest in the matter, the costs will be ordered to be paid out of the estate of the minors. *Ib.*

MORTGAGE.

1. The right of a mortgage creditor is on the thing itself, and may be exercised into whatever hands it may pass. *Succession of Field*, 5.

2. A sale by the administrator of a succession of property held by the deceased, subject to a mortgage, gives the mortgagee no claim against the succession. His rights cannot be affected by such a sale; and he must pursue the property in the hands of the subsequent third possessor. *Ib.*

3. A wife has a privilege on the moveables of her husband, for her dotal, but not for her paraphernal property. For the latter, she has only a tacit or legal mortgage on his immoveables. C. C. 2367, 3182.

Stafford v. *Dunwoodie*, 276.

4. Where a mortgage recites, that the mortgagor wishes to place the mortgagee "*à l'arbri de ses avances d'argent, et des effets des endossemens que celui-ci voudra bien lui fournir*," it will be considered as having been given to secure past, as well as future advances. *Succession of De Armas*, 342.

5. Acts granting mortgages will, in cases of doubt, be strictly construed. *Ib.*

6. Where a note, secured by mortgage, is prescribed, the mortgage is necessarily extinguished. A mortgage can only exist as an accessary to a principal obligation, with the extinction of which it disappears. C. C. 3251, 3252, 3374. *Auguste* v. *Renard*, 389.

7. The transfer of a negotiable note, by endorsement, operates a transfer of any mortgage given to secure its payment. C. C. 2615. *Ib.*

8. A railway is not an immoveable, either by nature or destination, when the soil on which it is laid belongs to another; it is, consequently, not affected by judicial or legal mortgages, nor susceptible of being mortgaged unless authorized by a special act of the legislature.

State v. *Mexican Gulf Railway Co.*, 513.

9. Future property can never be the subject of conventional mortgage. C. C. 3276. *Ib.*

See Mexican Gulf Railway.

NEW ORLEANS, CITY OF,

1. Sect. 4 of the act of 14th March, 1816, which provides that "neither the

Mayor, Recorder, nor any Alderman then in office, shall be allowed, in his own name, or through the medium of others, to become a lessee or bidder for any branch of the revenues of the city, nor for any work or undertaking whatever which may be authorized or ordered by the corporation of the city of New Orleans," cannot be considered as prohibiting such persons from leasing any lot of ground or other property, not forming an entire branch of the revenue of the city.

Second Municipality of New Orleans v. *Caldwell*, 368.

2. Under the ordinance of the Second Municipality of New Orleans, of 12th July, 1836, which declares, that the tax levied on the owners of the property for the reimbursement of their portion of the expense of paving, "shall be paid in cash within ninety days after the work is done, or in notes endorsed to the satisfaction of the Committee of Finance, at six, twelve, eighteen, and twenty-four months, bearing interest at the rate of eight per cent a year," interest, at that rate, may be recovered from a property-holder who has neglected to pay, within the ninety days, the amount assessed as his share of the cost of such pavement.

Second Municipality of New Orleans v. *McFarlane*, 406.

NEW ORLEANS AND CARROLLTON RAIL ROAD COMPANY.

1. By the first section of the act of 1 March, 1836, amending the charter of the New Orleans and Carrollton Rail Road Company, it is provided, that "the Company shall pay to the State, in ten equal annual instalments from the acceptance of the present act, seventy-five thousand dollars to be employed by the State for the completion of the Attakapas Canal through Lake Verret, whenever such improvements shall have been undertaken and the work actually commenced by the State, or by any Company legally chartered for the purpose." In an action, under this act, by the State, against the Company, who had accepted the act, for the instalments due: *Held*, that the State is entitled to recover, whether the works or improvements have been commenced or not; and that the defendants have nothing to do with the appropriation of the amount they contracted to pay.

State v. *New Orleans and Carrollton Rail Road Co.*, 418.

2. The liability of the stockholders in the New Orleans and Carrollton Rail Road Company under their subscriptions, is not affected by the act of 14th March, 1839, relieving the Banks from the forfeiture of their charters. If a further call upon those who have not paid in full, be necessary for the discharge of the debts of the Company, the Directors are authorized to make it.

Millaudon v. *New Orleans and Carrollton Rail Road Co.*, 488.

See BANK, 2.

NEW TRIAL.

1. The admission of irrelevant testimony is no ground for remanding a case for a new trial, where its exclusion would not probably vary the result.

Ferguson v. *Whipple*, 344.

2. Objections to a verdict lose much of their weight, when not made before the court which tried the case originally. A case will be less readily remanded on a question of fact, where a new trial has not been moved for below. An appeal from the judgment of an inferior tribunal, founded on a verdict, should only be taken after the refusal of a new trial.

Hughes v. *Lee*, 429.

NOTARY.

1. The certificate of a notary, that no note signed or endorsed by a particular person was protested by him within a certain period, is inadmissible. A notary can only certify copies of proceedings in his office; any other fact within his knowledge, must be disclosed under oath.

Exchange and Banking Company of New Orleans v. *Boyce*, 307.

2. The fees to which a notary public is entitled for his services being fixed by law, he cannot, under any pretence, demand additional compensation.

Walton, &c. v. *Their Creditors*, 438.

NOVATION.

A debtor does not, by the indication of another as the person to whom he is to pay, become the debtor of the latter; he continues to be the debtor of his original creditor.

State v. *New Orleans and Carrollton Rail Road Co.* 418.

PARAPHERNAL PROPERTY.

See HUSBAND AND WIFE.

PARTIES.

See APPEAL VI. EVIDENCE XIV. PLEADING II.

PARTITION.

1. The first settlement between heirs or partners, by which a state of *indivision* is terminated, is, in substance, a partition. *Tippett* v. *Jett*, 313.

2. An action for the nullity or rescission of partitions, is prescribed by five years. C. C. 3507. *Ib.*

See APPEAL 12. PARTNERSHIP 1. 3. 4. 8. 9.

PARTNERSHIP.

1. A partnership is dissolved by the death of one of the partners; and the property must be divided as soon as practicable, unless there be some stipulation to the contrary. *Mathison* v. *Field*, 44.

2. The representative of a deceased partner may take the necessary measures to protect the interest of the partner he represents; but he cannot administer the partnership affairs, unless authorized to do so by the contract of partnership. *Ib.*

3. Petition by the syndics of an insolvent for a division of partnership property by sale. Four experts having been appointed, by consent, to report whether the property could be divided in kind, without loss or inconvenience, and two only having reported, on motion of plaintiffs the order appointing experts was rescinded, and the court proceeded to receive other evidence of the facts intended to be established by their report. *Held*, that the report of the experts was not the only mode of proof to which the court might resort, to enable it to decide whether the property should be sold; and that, under art. 1261 of the Civil Code, any other legal evidence might be received.

Kohn v. *Marsh*, 48.

4. Where, in an action for the settlement of a partnership, the property is such as cannot be divided in kind without loss or inconvenience, a sale may be ordered at once, without waiting for the settlement of the partnership accounts. *Ib.*

5. A partnership formed for the purpose of purchasing timber, sawing it, and selling it for a profit, is, under art. 2796 of the Civil Code, a commercial one.

Succession of Hamblin, 130.

6. Where real property is purchased by a commercial firm, the members of the firm become joint owners thereof; and it cannot be alienated by one partner, without the consent of the rest. C. C. 2796. But where the latter, by receiving a portion of the price, subsequently ratify a sale by the former, they will be estopped from asserting any title to the prejudice of a *bona fide* purchaser. *Thomas* v. *Scott*, 256.

7. Partners cannot plead ignorance of the transactions of their house. *Ib.*

8. Though the legal title to real property bought by a commercial firm, be in the members individually, each holding an undivided share, the value thereof belongs to the partnership; and a partner, after disposing of his interest therein, cannot avail himself of his legal title to sue for a partition. *Ib.*

9. The property of a partnership is common, held *pro indiviso* by all the partners, responsible for the debts of the concern, and subject, after their payment, to division among the partners, according to their agreement. Each is a debtor for what he promises to bring in; and if one have brought in more than the rest, he is a creditor of the partnership for the difference, and, as between the partners, has a right of retention on the common stock for its repayment, and for any debt of the partnership for which he may be made responsible.

Millaudon v. *New Orleans and Carrollton Rail Road Co.* 488.

See Bank 2. Partition 1.

PAYMENT.

1. A note, though made payable in dimes, may be discharged by a payment in any other legal coin of the United States.

Commissioners of the Atchafalaya Rail Road and Banking Co. v. *Bean*, 414.

2. An agreement, by an attorney at law, to receive payment of a judgment in any thing but the legal currency of the United States, will not be binding on the plaintiff. *Dunbar* v. *Morris*, 278.

3. The holder of an accepted draft for a sum payable in the notes of a particular Bank protested at maturity, will be entitled to recover the value of the notes at the date of the protest. A subsequent tender of the amount in the notes of the Bank, they having depreciated in the mean time, will not entitle the defendant to settle the debt at the value of the notes at the date of the tender. *Meeks* v. *Davis*, 326.

4. A payment cannot be imputed to the reduction of the principal, where any interest is due. C. C. 2160. *Shaw* v. *Oakey*, 361.

PETITORY ACTION.

See EVIDENCE 69, 70, 71.

PLEADING.

I. *Of the Petition.*
II. *Parties to Actions.*
III. *Certain Actions where to be brought.*
IV. *Exceptions and Answer.*
V. *Demands in Compensation and Reconvention.*
VI. *Amendments.*
VII. *Interrogatories to a Party.*
VIII. *Admissions.*
IX. *Striking out Plea.*

I. *Of the Petition.*

1. The signature of the petitioner to an affidavit which the law requires to be annexed to the petition, is a sufficient signature of the petition itself. *Zollicoffer* v. *Briggs*, 236.

2. A party entitled to the compensation due to the owners of the contiguous lots, from a proprietor of the intermediate ground who has made use of their walls, may cumulate in one action the debts due for the use of the walls of both owners. *Kennedy* v. *Oakey*, 404.

See EMANCIPATION OF SLAVES.

II. *Parties to Actions.*

3. In an action on a joint contract all the obligors must be made defendants, though one of them may have performed his part, or may be domiciliated in a parish beyond the jurisdiction of the court, parties contracting joint obligations being considered to waive the personal privilege of being sued before the court having jurisdiction over the place of their domicil; and the judgment must be against each defendant, separately, for his proportion. *Thompson* v. *Chrétien*, 26. *Drew* v. *Atchison*, 140.

4. The judgment for costs, in an action on a joint contract, must be *in solido* against those who have not performed their part. *Ib.*

5. In an action on a joint contract, the suit was dismissed by the inferior court

as to one of the defendants, on the ground of his domicil being in a different parish. Plaintiff took no appeal from the judgment of dismissal, but obtained a judgment against the other defendant. On an appeal by the latter: *Held*, that the action being on a joint contract, both contractors must be before the court; that the plaintiff having failed to make use of the means given him by law to reverse the erroneous decision of the inferior court, cannot avail himself of his own neglect; and that there must be judgment as in case of nonsuit. *Thompson* v. *Chrétien*, 26.

6. Where a party to a suit pending before a State court, applies to be declared a bankrupt under the act of Congress of 19th August, 1841, the proceedings must be suspended, for a reasonable time, to enable him to file the decree, when the assignee must be made a party. As soon as the decree in bankruptcy is pronounced, the bankrupt, in relation to all actions for and against him except such as the statute prescribes, is legally dead, and can only be represented by the assignee. *Fisher* v. *Vose*, 457.

III. *Certain Actions where to be brought.*

7. An overseer, though entitled to a privilege on the crop for the payment of his wages, cannot maintain an action against his employer in the parish in which the plantation is situated, where the domicil of the latter is in a different parish. The privilege granted by law to overseers, is, like all others, an accessory to the principal obligation, and must follow it.

Hollander v. *Nicholas*, 7.

8. The penalty imposed by the eighteenth section of the act of 7th June, 1806, on the owner or occupier of a plantation, for keeping slaves thereon, without a white or free colored person as manager or overseer, can only be recovered by civil action before an ordinary tribunal. The action must be brought before a Justice of the Peace, a Parish, or District Court, according to the number and amount of the fines claimed. *State* v. *Linton*, 55.

IV. *Exceptions and Answer.*

9. Discussion, like all other dilatory exceptions, must be pleaded *in limine litis*. It cannot be received after issue joined. *Dwight* v. *Linton*, 57.

10. Under art. 335 of the Code of Practice, the exception of *litispendéncia*, must show the pendency of another suit, between the same parties, for the same object, and growing out of the same causes of action, before another court of concurrent jurisdiction. *Succession of Ludewig*, 92.

11. The exception *litispendéncia* must be pleaded *in limine litis*. Where it is not pretended that judgment has been rendered in the first suit, it cannot be admitted in bar. *Long* v. *Long*, 108.

12. An exception to the jurisdiction of the court, waived below, cannot be revived in the appellate court. *Reynolds* v. *Rowley*, 201.

13. There is a class of exceptions which may be pleaded for the first time on the appeal; but the facts necessary to sustain them, must appear from a mere inspection of the record. *Zollicoffer* v. *Briggs*, 236.

14. A prayer for a trial by jury, by one of two or more debtors bound *in solido*, will not enure to the benefit of those who have not joined therein.

Mulhollan v. *Henderson*, 297.

15. Where the defendant, in a redhibitory action for the price of a slave, pleads a general denial, and specially denies that he was aware of the alleged unsoundness, he cannot set up in his defence that the alleged defect was one which the buyer might have discovered by simple inspection. Such an exception should have been pleaded specially, to put the plaintiff on his guard, and afford him an opportunity of disproving the fact. *Hivert* v. *Lacaze*, 357.

16. One who relies on a peremptory exception, founded in law, must plead it specially. *Ib.*

17. The putting a debtor in default, is a condition precedent to the recovery of damages for the violation of a contract. The want of it need not be pleaded, but may be taken advantage of at any time. C. C. 1906.

Hodge v. *Moore*, 400.

18. Where the petition prays for a judgment against defendants *in solido*, and one of the latter severs in his answer, but does not plead that the obligation is joint only, and judgment is rendered against defendants *in solido*, it will not be disturbed on appeal. *Comstock* v. *Pate*, 440.

See PARTNERSHIP, 7.

V. *Demands in Compensation and Reconvention.*

19. Pleas in compensation must be set forth with the same certainty as to amount, dates, &c., as would be necessary if the party setting them up were the plaintiff in a direct action. General allegations will not suffice. *Smith* v. *Scott*, 258. And so of demands in reconvention. *Jonau* v. *Ferrand*, 364.

20. A balance due on an unliquidated account, cannot be pleaded in compensation to an action on a due bill or *bon*; nor in reconvention, when unconnected with the plaintiff's claim. *Jonau* v. *Ferrand*, 364.

VI. *Amendments.*

21. An amended petition propounding interrogatories to a party to the action, offered after the trial has commenced, will be too late.

Dabbs v. *Hemken*, 123.

22. As a general rule, amendments should be admitted where the justice of the case will be promoted thereby, but they must be presented before going to trial. The case must be an extraordinary one, to justify the reception of an amendment after the trial has commenced; and the amendment must not be calculated to produce delay. *Ib.*

VII. *Interrogatories to a Party.*

23. A party to a suit, interrogated as to a particular fact, cannot, under the pretext of answering the interrogatory, annex to his answer letters of a third person, and thus introduce in evidence statements not under oath, for the purpose of influencing the jury on other points in the case.

Reynolds v. *Rowley*, 201.

24. A party to a suit is not bound to answer interrogatories propounded to him by his opponent, unless ordered to do so by the court. C. P. 348.
Commercial Bank of Natchez v. *King*, 243.

25. Where an action commenced by an administrator, is carried on, after the expiration of his administration, by the heirs, the defendant cannot examine him as a party, by annexing interrogatories to an amended answer. The term of his administration having expired, he had no interest in the case, and cannot be interrogated as a party. *Hawkins* v. *Brown*, 310.

VIII. *Admissions.*

26. Any consent given, or admission made on record, by a party, in the progress of a suit, from which his adversary may derive any legal right, cannot be withdrawn without the consent of the latter, who is entitled to the benefit of its full legal effect. *Aliter*, where such consent or admission confers no right, as where experts have been appointed, by consent, to ascertain a fact, in which case either party may move to rescind the order, or it may be done by the court *ex officio*. *Kohn* v. *Marsh*, 48.

27. Property of certain minor heirs having been sold by the parish judge, was afterwards seized under an execution by a creditor of the purchaser. The tutor of the heirs opposed the payment of the proceeds of the sale to the creditor, claiming a vendor's privilege for the price yet due, and setting up a mortgage given to secure the payment. In an action subsequently commenced by him, on behalf of the minors, against the syndic of the purchaser, to recover the land: *Held*, that his opposition to the payment of the proceeds to the seizing creditor, could not preclude the minor heirs from claiming the land itself. *Beard* v. *Morancy*, 120.

28. A defendant will not be permitted, by shifting his grounds of defence, to contradict, by an amended answer, facts stated and admissions made by him in his original answer. *Estill* v. *Holmes*, 134.

29. Action by the payee on a promissory note. Defendant answered, pleading a failure of consideration, and alleging that the note was given in error, for the price of a tract of land purchased by plaintiff from a person to whom defendant had previously sold it. In an amended answer, filed at a subsequent term, he averred, that the note was executed for the price of a tract of land belonging to the United States, to which plaintiff pretended to have a pre-emption right; and which he bound himself to convey by a good title to defendant; that plaintiff had no pre-emption right to the land; and that the United States had sold the land to a third person, which sale had come to defendant's knowledge, since the last term of the court. The sale by the United States was established. *Held*, that defendant could not be allowed to gainsay the admissions originally made by him, and that he must be estopped by his warranty, as vendor, from praying for a rescission on the ground of want of title in the plaintiff. Judgment in favor of the latter. *Ib.*

30. Where, in an action against the maker of a note, in whose hands different creditors of plaintiff have seized all sums due by him to the latter, defendant denies that he is indebted to the plaintiff, he will not be exempted from the

payment of interest, on the ground of uncertainty as to whom he should pay. Having denied that he was at all indebted, he cannot allege that he was prevented from paying by any uncertainty as to whom he should pay.

Rightor v. *Sidell*, 375.

See EVIDENCE, 22. 25.

IX. *Striking out Plea.*

31. Instead of striking out any portion of the pleadings, a more regular course is to permit the parties to go to trial, and to reject, on the objection of the opposite party, any evidence offered to sustain such portion.

Jonau v. *Ferrand*, 364.

POLICE JURY.

The Police Jury of a parish is a political corporation. It may sue and be sued, and act through agents of its own appointment.

McGuire v. *Bry*, 196.

PRESCRIPTION.

1. The general doctrines relative to the interruption of prescription, do not apply to the period fixed by art. 593 of the Code of Practice, after which no appeal will lie. No appeal can be taken after the expiration of that time, though one may have been dismissed, which was taken within the period.

Griffing v. *Bowmar*, 113.

2. To support the prescription of ten years, the title to the immoveable must be apparently good, and of a character to induce the belief, on the part of the possessor, that it is perfect. A title, defective on its face, will not be sufficient; *aliter*, where the defect proceeds from circumstances or evidence *dehors* the instrument. *Eastman* v. *Beiller*, 220.

3. Where one assumes to sell without title, or without disclosing the defects in his title, the vendee, in good faith, though holding *a non domino*, may plead the prescription of ten years. Otherwise, where vendor sells only his right or interest, shows what it is, and declines to warrant generally, thus bringing home to the vendee a knowledge of his title. *Ib.*

4. Under the act of 28th February, 1837, actions against the sureties of a sheriff on his official bond, are prescribed by the lapse of two years.

Mulhollan v. *Henderson*, 297.

5. An action for the nullity or rescission of partitions, is prescribed by five years. C. C. 3507. *Tippett* v. *Jett*, 313.

6. Where a note, secured by mortgage, is prescribed, the mortgage is necessarily extinguished. A mortgage can only exist as an accessory to a principal obligation, with the extinction of which it disappears. C. C. 3251, 3252, 3374. *Auguste* v. *Renard*, 389.

PRESUMPTION.

See EVIDENCE, XIII.

PRIVILEGE.

1. Under art. 722 of the Code of Practice, the creditor acquires, by the mere act of seizure, a privilege on the immoveable or moveable property seized, which entitles him to a preference over other creditors, unless the debtor has been declared a bankrupt previous thereto. If the seizure created a privilege only where the property of the debtor was sufficient to pay all his debts, it would only attach when it would be useless.

Campbell v. *His Creditors*, 106.

2. Art. 301 of the Code of Practice, which declares that the "sheriff may be enjoined from paying the claim of the plaintiff out of the proceeds of the sale of the property seized, if a third person oppose such payment alleging that the defendant has no other property to pay his debts, and pray that the proceeds may be brought into court, to be distributed among all the creditors of the defendant, according to the order of their respective privileges or hypothecations," makes a provision in favor of the creditors who have a *higher privilege* than that of the seizing creditor. It directs the proceeds to be divided among the creditors according to their respective privileges and hypothecations, including the privilege obtained by the seizure. *Ib.*

3. One who has ceased to act as overseer, but continues his services as an agent for the owners of a plantation, has no privilege on the crop for his services in the latter capacity. *Succession of Johnson*, 216.

4. An overseer whose services have continued for one year and for a part of a second, has, under art. 3184 of the Civil Code, § 1, a privilege on the crops of both years, or on either, for the whole amount due him. His privilege on the crop of the past year, may be exercised upon its proceeds, even after it has been sold; but as to the growing crop, his privilege is confined to the crop itself. *Ib.*

5. The holders of notes given for the price of a tract of land, though not identified with the sale by the *paraph* of a notary, will be entitled to a privilege on the thing sold. The *paraph* of the notary is not the only means by which the notes may be identified. Their identity may be proved by his oath. *Ib.*

6. Where the vendors of slaves have left them for a number of years in the possession of the vendee, without taking any steps to preserve their privilege, they cannot assert it to the prejudice of creditors who have obtained judgments against him, or received special mortgages from him. C. C. 3238. *Blackstone* v. *His Creditors*, 219.

7. A wife has a privilege on the moveables of her husband, for her dotal, but not for her paraphernal property. For the latter, she has only a tacit or legal mortgage, on his immoveables. C. C. 2367, 3182.

Stafford v. *Dunwoodie*, 276.

8. Defendant having seized under a *fi. fa.* certain moveables belonging to the husband of the plaintiff, the latter procured an injunction, pending which she obtained a judgment against her husband in a suit for separation of property, and, in virtue thereof, caused the moveable property, previously seized by

defendant, to be sold, and purchased it herself, crediting the amount upon her judgment. On a motion to discharge the injunction: *Held*, that by his seizure defendant had acquired a privilege on the moveables seized; that the rights of the wife, being merely paraphernal, gave her no privilege on the moveables; and that having, by the effect of her seizure, disabled the defendant from enforcing his privilege, she was responsible in damages for the injury he sustained from her act. *Ib.*

9. Art. 3499 of the Civil Code does not apply to shipwrights who undertake to build or repair ships or other vessels, whether under a contract for a stipulated sum, or otherwise. It applies only to the claims of workmen or laborers for their daily or monthly wages, and to the sellers of materials for the price thereof, against the person with whom they contract directly, whether the owner or undertaker. *Harrod* v. *Woodruff*, 335.

10. Where plaintiff in an action commenced by attachment, has obtained a judgment before defendant's application to be declared a bankrupt under the act of Congress of 1841, he will be entitled to a preference on the property attached. *Aliter*, where defendant's application was made before judgment. In the last case no privilege is acquired. *Fisher* v. *Vose*, 457.

PUBLIC LANDS OF THE UNITED STATES.

1. The Registers of the Land Offices of the United States may, like all other keepers of public records, give copies or extracts from any books or documents in their custody, and such copies, when duly certified, are admissible in evidence; but they cannot attest or certify the contents of such books or documents in any other manner. *Judice* v. *Chrétien*, 15.

2. The act of Congress of 29th May, 1830, granting pre-emption rights to settlers on the public lands, which provides, sect. 2, that "where two or more persons are settled on the same quarter section, it may be divided between the two first actual settlers, if, by a north and south, or east and west line, the settlement or improvement of each can be included in a half-quarter section, and that in such case the settlers shall each be entitled to a pre-emption of eighty acres elsewhere in said land district," is directory only. Its object is to give to each settler, *first*, the portion of land on which his improvements were made, and *secondly*, as nearly as possible, an equal quantity of land. Equality of value was not considered important. The direction of the line of division was of secondary consideration, and only intended to effect the principal object. *Downes* v. *Scott*, 84.

3. Where the United States have sold, and given a patent for a tract of land, the property is vested in the purchaser; and the laws of the State in which it is situated operate on it as on other property, except as to taxation, or other special exception; and in effecting a partition, such laws, and the contract of the parties, will, as in other cases, control. *Ib.*

4. In ordering a partition between settlers on the same quarter section, holding as tenants in common, by purchase from the United States, under the pre-emption law of 29th of May, 1830, or between others holding under them, the provisions of that act will be considered as expressing the original

intention of the parties as to the direction of the line of division, where the quarter section is a regular one; *aliter*, as to irregular or fractional surveys. Where lines drawn north and south, or east or west, would not give to each an equal quantity of land, as well as his improvements, the line must be drawn in some other direction, or the land cannot be divided in kind. *Ib.*

5. Under the act of Congress regulating pre-emptions, the Register and Receiver of the Land Office in the district in which the lands lie, have, alone, authority to decide upon claims for pre-emptions; and proof must be made, to their satisfaction, of all the facts necessary to establish the applicant's right to purchase by preference. *Kellam* v. *Rippey*, 138.

6. The right to claim a pre-emption, conferred by act of Congress, does not give the party entitled thereto, any title in or to the land, until he exhibits the necessary proof, and procures the adjudication of the Register and Receiver of the Land District. *Ib.*

7. In an action by one claiming land under a patent from the United States, against a party in possession who had made valuable improvements thereon, the latter will be entitled to claim the excess of the value thereof above the fruits received since the commencement of suit. *Ib.*

8. Where one entitled to claim a tract of land, as an actual settler prior to the twentieth of December, 1803, under the act of Congress of the third of March, 1807, relative to land claims in the territories of Orleans and Louisiana, sells all his right, title, and interest therein, and the claim is subsequently confirmed in the name of the original settler, the confirmation will enure to the benefit of his vendee. *Noulen* v. *Perkins*, 233.

9. One who sells all his right, title, and interest in an improvement made on the public lands, must be considered as parting with all the ulterior advantages to which he may be entitled in virtue thereof. *Ib.*

10. In controversies between the original grantee of a tract of land, or those claiming directly under him, and one in whose favor, as assignee, the title has been confirmed by the Commissioners of the United States, the certificate in favor of the latter, and the facts recited in it, will not be evidence, but the confirmation will enure to the benefit of the party having the inchoate title. Otherwise, as to third persons showing no title. The Commissioners appointed to decide upon land titles emanating from the former sovereigns of Louisiana, being authorized, by different acts of Congress, to confirm inchoate titles existing at the time of the change of government, in favor of certain grantees, or *their legal representatives*, had authority, *incidentally*, to decide whether one who claimed, not as the original grantee, was entitled to a confirmation; and such confirmation, in favor of an assignee, has been uniformly regarded as entitling the latter to a patent. It is evidence against the government, and though not binding on the original grantee, or those claiming under him, is *prima facie* evidence against the rest of the world. *Thomas* v. *Turnley*, 206.

11. A receipt of the Receiver of Public Moneys, for the price of government lands, is sufficient evidence of title from the United States, to form the basis

of a petitory action—not that it is of equal dignity with a patent, but evidence of an equitable title on which the owner may recover.

Lott v. *Prudhomme*, 93

12. Where the boundaries of a confirmed claim are vague and uncertain, and are to be fixed by the operations of the surveying department, or the confirmation is only the recognition of a pre-existing right, and before such survey and location the government sells a part of the land, not necessarily embraced within the tract confirmed, the title of the purchaser under such sale will prevail. *Ib.*

13. The Commissioner of the General Land Office has no authority to vacate a patent already issued; but he may declare a *certificate of purchase* of lands, which the law has forbidden to be sold or disposed of, to be void. *Ib.*

14. Whenever the question arises, whether the title to property, which belonged to the United States, has passed, it must be resolved by the laws of the United States. But where it has once passed, it becomes, like all other property in the State, subject to State legislation, so far as such legislation is consistent with the admission that the title has so passed. *Ib.*

15. A patent from the United States, for a portion of the public lands, is conclusive, unless attacked on the ground of error or fraud; and the question of error or fraud, so far as it concerns a citizen of this State, must be determined by our laws. *Ib.*

16. The moment a patent for public lands has passed the great seal, it is beyond the power of the officers of the United States. *Ib.*

QUASI-CONTRACTS.

1. The joint owners of a plantation are liable, each for his virile share, for supplies furnished for its use. *Reynolds* v. *Rowley*, 201.

2. Mere voluntary payments, on some previous occasions, will not, of themselves, create an obligation to pay under future, though similar circumstances. *Hazard* v. *Lambeth*, 378.

3. Plaintiff having transferred certain shares of bank stock to a third person, for the purpose of enabling the transferree to raise money thereon, defendant caused a *fi. fa.*, which he had obtained against such third person, to be levied on the stock as the property of the latter. The execution was enjoined by plaintiff, who claimed the stock as his own. On a motion to dissolve: *Held*, that by transferring the stock to enable the transferree to raise money thereon, plaintiff made him the apparent owner, and thereby deceived his creditors; and that the injunction was correctly dissolved.

Page v. *Porée*, 439.

See AGENCY, 3. 5.

QUASI-OFFENCES.

Defendant having seized under a *fi. fa.* certain moveables belonging to the husband of the plaintiff, the latter procured an injunction, pending which she ob-

tained a judgment against her husband in a suit for separation of property, and, in virtue thereof, caused the moveable property, previously seized by defendant, to be sold, and purchased it herself, crediting the amount upon her judgment. On a motion to dissolve the injunction: *Held*, that by his seizure defendant had acquired a privilege on the moveables seized; that the rights of the wife, being merely paraphernal, gave her no privilege on the moveables; and that having, by the effect of her seizure, disabled the defendant from enforcing his privilege, she was responsible in damages for the injury he sustained from her act. *Stafford* v. *Dunwoodie*, 276.

RAILWAY.

See IMMOVEABLES.

RECEIVER.

1. Though a receiver, appointed to collect money due to the parties to a suit, have no authority to pay debts due by them, yet if they know that he is doing so, and do not object at the time, they cannot do so afterwards. *Kellar* v. *Williams*, 321.

2. Where, on the motion of one of the parties to a suit, with the consent of the other, a third person is appointed by the court to receive and sue for all amounts due to the litigants, on giving bond, with security, to hold the amounts so received subject to the order of the court, he will not be considered an officer of the court, but the agent of the parties, and only responsible as such. The appointment is the act of the parties. *Ib.*

See EVIDENCE, 4.

RECONVENTION.

See APPEAL, 6. PLEADING, V.

RECUSATION OF JUDGE.

See SUCCESSIONS, 4.

REDHIBITORY ACTION.

See PLEADING, 15. SALE, VI.

REGISTER OF CONVEYANCES IN NEW ORLEANS.

The act of 20th March, 1827, establishing the office of Register of Conveyances for the city and parish of New Orleans, was intended only to create a particular office, for that city and parish, in which all transfers of immoveable property should be recorded, which, in other parishes, were required to be recorded in the office of the parish judge. *Lee* v. *Darramon*, 160.

REGISTRY.

1. The provisions of arts. 697 and 698 of the Code of Practice, requiring the sheriff to cause the act of sale executed by him for property sold under a *fi. fa.*, to be recorded in the office of the clerk of the court from which the writ was issued, were designed to give to the sheriff's deed the authenticity of a notarial act, and to authorize its introduction in evidence without further proof of its execution. They do not repeal, nor in any way modify the act of the 24th March, 1810, which declares, sect. 7, that no notarial act concerning immoveable property shall have effect against third persons, until recorded in the office of the parish judge of the parish in which it is situated; nor that of 26th March, 1813, providing, sect. 1, that sales of land or slaves, under execution, shall, except between the parties, be void, unless so recorded. *Lee* v. *Darramon*, 160.

2. Where the sheriff's deed for immoveable property sold under a *fi. fa.*, subject to a previous mortgage, has not been recorded in the office of the parish judge of the parish in which the propetry is situated, it will be without effect as to the hypothecary creditor, who may seize and sell the same as if in possession of the original debtor. *Ib.*

RESCISSION, ACTION OF.

See SALE, VI. EVIDENCE, 72. 73. 74. 75. 76.

RES JUDICATA.

1. The fact that a party was a minor at the time that a judgment was rendered against him, and that his tutor did not attend to, or understand his rights, or take the necessary pains to procure the testimony to establish them, will not entitle him to relief, though it be proved that a different judgment must have been rendered, had the proper testimony been produced in the first instance. The first judgment is *res judicata*. *Towles* v. *Conrad*, 69.

2. The discovery, since the final decision of the appellate court, of new evidence tending to establish allegations in the original petition, is no ground for enjoining the execution of the judgment. The matter is *res judicata*. *Campbell* v. *Briggs*, 110.

3. The record of another suit, when offered to support a plea of *res judicata*, is admissible to show what the parties claimed, and what was decided in such suit. So the record of another suit, to which the plaintiffs were parties, though joined with others and in a different capacity, is admissible against them, when offered by the defendants, who were plaintiffs in that case; the latter are entitled to the full benefit of any decision made on the rights of the parties, and to show that the plaintiffs have compromised any of their rights by that suit. *Wells* v. *Compton*, 171.

4. An injunction will not lie to stay the execution of a judgment for the amount of a note given for the price of a tract of land, on the allegation that, since the rendering of the judgment, plaintiff has discovered that the defen-

dant, his vendor, had no title to the land. The execution can only be resisted by appeal, or action of nullity, or on an allegation of extinguishment by payment, release, confusion, novation, or other legal mode.

Morrison v. *Crooks*, 273.

RESPITE.

1. A debtor who, being unable to pay all his debts at the moment, transacts with his creditors and obtains from them a delay, is not an insolvent. The concession of a respite is based upon the supposed solvency, or eventual ability of the applicant to pay all his debts. The laws relative to respite are not insolvent laws. *Rasch* v. *His Creditors*, 407. *Miller* v. *Rasch*, 410.

2. The debtor who applies for a respite does not seek a discharge from his obligations, nor attempt to impair them. The laws of this State relative to respites are not unconstitutional, nor were they repealed or suspended by the act of congress of 19th August, 1841, establishing a uniform system of bankruptcy. *Ib.*

RULE TO SHOW CAUSE.

1. Where, through error, an order has been made allowing a suspensive appeal on security for costs only, and no transcript of the record has been delivered to the party, the order may be rescinded by the lower court on a rule to show cause. *Mathison* v. *Field*, 42.

2. Action for $90 paid to defendant, in error, as owner of a butcher's stall, and for $2000 damages for forcibly turning plaintiff out and retaining the possession of the stall. Plaintiff having obtained a rule on defendant to show cause why he should not be put in possession, it was made absolute, and defendant appealed. *Held*, that the court erred in ordering a part of the case to be tried on a rule, and leaving the remainder untried. A cause should not be tried on any other day than the one fixed by the court, when called in its turn. C. P. 463.

Gerber v. *Marzoni*, 370. *Beaudouin* v. *Rochebrun*, 372.

See Attorney at Law, 3. United States, Officers of.

SALE.

I. *Form and Requisites of a Sale.*
II. *Warranty.*
III. *Rights and Obligations of Vendee.*
IV. *Putting Vendee in Default.*
V. *Action for Reduction of Price.*
VI. *Rescisson on account of Redhibitory Defects, Fraud, &c.*
VII. *Privilege of Vendor.*

VIII. *Judicial Sales.*
IX. *Sales of Public Lands of the United States.*

I. *Form and Requisites of a Sale.*

1. The vendor of a tract of land is bound to put the purchaser in possession; and where he sells at different times by separate portions, without boundaries, to different persons, the first purchaser must be satisfied before a second can obtain any portion of his. *Wells* v. *Compton*, 171.
2. Where real property is purchased by a commercial firm, the members of the firm became joint owners thereof; and it cannot be alienated by one partner, without the consent of the rest. C. C. 2796. But where the latter, by receiving a portion of the price, subsequently ratify a sale by the former, they will be estopped from asserting any title to the prejudice of a *bona fide* purchaser. *Thomas* v. *Scott*, 256.
3. The act of receiving the whole or a part of the proceeds of property, sold without authority, amounts to a ratification of the sale, and will preclude the owner from disturbing the purchaser. *Ib.*
4. A vendor may refuse to deliver the thing sold, though he may have granted a term for the payment, where, from the absconding of the vendee, he would be in imminent danger of losing the price. C. C. 2464. *Cook* v. *West*, 331.
5. A sale is perfect, between the parties, as soon as they agree as to the thing and the price. As to third persons, the property of the thing sold passes to the vendee, only by delivery. *Ib.*
6. A vendee who has not received the thing sold, nor paid the price, can transfer to a third person only his right to require the delivery of the thing on the payment of the price, or on giving security for its payment at the time agreed on. *Ib.*
7. One who stands by and sees his property sold as belonging to another, will not be permitted to set up his title in opposition to a *bona fide* purchaser, who has bought on the faith of his declarations or apparent acquiescence. *Aliter*, where the purchaser knew the extent of the rights of the claimant, and was not misled by the acknowledgments so made. *Ib.*
8. Where the record does not show whether a slave sold was delivered to the vendee at the time of the adjudication, or after the execution of the notarial act, it will be presumed that the vendor retained possession until the act of sale was passed. C. C. 2588. *Hivert* v. *Lacaze*, 357.
9. A sheriff has a right to retain possession of property sold by him, during the pendency of a rule to show cause why the sale should not be set aside. *Bayon* v. *Breedlove*, 387.
10. Parol evidence is admissible to prove an agreement to sell a vessel, anterior to the date of the written act of sale. *Bell* v. *The Firemen's Insurance Company of New Orleans*, 423. *Bell* v. *Western Marine and Fire Insurance Co.*, 428.
11. One who has agreed to sell a vessel, but has neither delivered it nor received the price, has an insurable interest, the vessel being still at his risk. *Ib.*

II. *Warranty.*

12. A purchaser, fully aware of the danger of eviction at the time of the purchase, cannot resist payment of the price on the ground of eviction. C. C. 2481. *Estill* v. *Holmes*, 134.

13. Action by the payee on a promissory note. Defendant answered, pleading a failure of consideration, and alleging that the note was given in error, for the price of a tract of land, purchased by plaintiff from a person to whom defendant had previously sold it. In an amended answer, filed at a subsequent term, he averred, that the note was executed for the price of a tract of land belonging to the United States, to which plaintiff pretended to have a pre-emption right, and which he bound himself to convey by a good title to defendant; that the plaintiff had no pre-emption right to the land; and that the United States had sold the land to a third person, which sale had come to defendant's knowledge, since the last term of the court. The sale by the United States was established. *Held*, that defendant could not be allowed to gainsay the admissions originally made by him, and that he must be estopped by his warranty, as vendor, from praying for a rescission on the ground of want of title in the plaintiff. Judgment in favor of the latter. *Ib.*

14. Art. 2535 of the Civil Code, which provides, that where a purchaser, who was not informed before the sale of the danger of eviction, is, or has just reason to fear that he will be disquieted in his possession, by any claim, he may suspend the payment of the price until he be restored to quiet possession, unless the seller prefer to give security, does not contemplate the case in which a purchaser's fear of being disquieted arises from a naked point of law. Every one is bound, at his peril, to know the law.

Hodge v. *Moore*, 400.

III. *Rights and Obligations of Vendee.*

15. Where one assumes to sell without title, or without disclosing the defects in his title, the vendee, in good faith, though holding *a non domino*, may plead the prescription of ten years. Otherwise, where vendor sells only his his right or interest, shows what it is, and declines to warrant generally, thus bringing home to the vendee a knowledge of his title.

Eastman v. *Beiller*, 230.

16. Where in a sale of goods, a time for payment is fixed, an agreement to pay interest may be implied. *Shaw* v. *Oakey*, 361.

IV. *Putting Vendee in Default.*

17. To put the purchaser in default, the vendor must tender for his signature an act drawn up in strict conformity to law, and such as the former is bound to sign. *Hodge* v. *Moore*, 400.

18. Where, in an action against the purchaser of property sold at auction who had failed to comply with the terms of the sale, for the difference between the price bid by him and that at which it was adjudicated on the second exposure, and for the expenses subsequent to the first sale, it appears that the act of sale prepared by a notary and tendered to defendant, was unaccom-

panied with the certificate required by law, showing what privileges or mortgages existed on the property, the defendant will not be considered to have been put *in mora*. C. C. 2589, 3328. *Ib.*

See PLEADING, 17.

V. *Action for Reduction of Price.*

19. Action by the transferree of instalments due for the price of land. Defendant pleaded a deficiency in quantity, claimed a diminution of the price, and prayed that his vendors might be made parties, and condemned to refund a portion of the amount already paid. Judgment for the plaintiff, and appeal by defendant, the plaintiff alone being cited. *Held*, that the vendors stood towards the defendant in the capacity of plaintiffs, and should have been made appellees; and that the appeal must be dismissed for want of proper parties. *Moore* v. *Rutherford*, 60.

See 33, *post.*

VI. *Rescission on account of Redhibitory Defects, Fraud, &c.*

20. Where the purchaser knew of the defects before the sale, no redhibitory action will lie. *Lebesque* v. *Bonin*, 12.

21. A *brand* or herd of *running* cattle, advertised and sold as consisting of a certain number, amounted, in fact, to not more than a third. In an action for the price, defendants, having sold a part of the cattle, prayed for a rescission of the sale, or diminution of the price. *Held*, that as defendants could not return all the cattle they had received, the sale could not be rescinded, and that a diminution of the price was properly allowed.

Richard v. *Parrott*, 75.

22. The express exclusion, in the sale of a slave, of warranty, except as to title, is not, as a general rule, equivalent to a declaration of unsoundness, and will not relieve the vendor from the obligation of disclosing redhibitory vices or maladies, not apparent, which he knows to exist; and the concealment of such defects will be fraud within the meaning of art. 2526 of the Civil Code. *Aliter*, where from the terms of the exclusion, the idea is conveyed that the slave was unsound; in such case, the exclusion will amount to a declaration of unsoundness. *Galpin* v. *Jessup*, 90.

23. In an action for the price of a slave, the jury, if satisfied that he was addicted to theft, may either rescind the sale, or grant an abatement in the price. *Hawkins* v. *Brown*, 310.

24. Parol evidence is admissible to show that the vendor made known, at the time of the sale, the defects of the thing sold. *Ib.*

25. In all actions of rescission, the party seeking relief must have offered to restore his adversary to the situation he was in before the contract.

Tippett v. *Jett*, 313.

26. Proof of an offer by the vendor to annul the sale of a slave, on the payment of a certain sum, will exonerate the plaintiff, in a redhibitory action, from the

necessity of proving a tender of the slave. The tender would have been useless, without the payment of the sum demanded.

Hivert v. *Lacaze*, 357.

27. Concealment by the vendor of a slave, of the fact that the intellect of the slave was not sound, is a fraud upon the purchaser, and will annul the sale. And so, though the sale was made, in the absence of the owner, by an agent aware of the defect. *Ib.*

28. Concealment by the vendor of any vice or defect in a slave, is no fraud, unless such vice or defect would furnish ground for redhibition.

Gros v. *Bienvenu*, 396.

29. The purchaser of a slave, to entitle himself to the benefit of the third section of the act of 2d January, 1834, which provides that one who institutes a redhibitory action on the ground that the slave is a runaway or thief, shall not be bound to prove that such vice existed before the sale, when discovered within two months thereafter, where such slave had not been more than eight months in the State, must show that the slave has not resided therein for eight months preceding the sale. *Smith* v. *McDowell*, 430.

See PLEADING, 15.

VII. *Privilege of Vendor.*

30. The holders of notes given for the price of a tract of land, though not identified with the sale by the *paraph* of a notary, will be entitled to a privilege on the thing sold. The *paraph* of the notary is not the only means by which the notes may be identified. Their indentity may be proved by his oath.

Succession of Johnson, 216.

31. Where the vendors of slaves have left them for a number of years in the possession of the vendee, without taking any steps to preserve their privilege, they cannot assert it to the prejudice of creditors who have obtained judgments against him, or received special mortgages from him. C. C. 3238.

Blackstone v. *His Creditors*, 219.

VIII. *Judicial Sales.*

32. In an action, by the purchaser, at a sale under execution, of the undivided shares of certain heirs in a succession, against the administrator, for paying over the amount to the heirs after notice, the defendant cannot set up any irregularity or nullity in the original proceeding against the heirs; the payment is at his peril, and he will be liable over to the purchaser.

Noble v. *Nettles*, 153.

See SUCCESSIONS, IV.

IX. *Sales of Public Lands of the United States.*

See PUBLIC LANDS OF THE UNITED STATES.

SHERIFF.

1. No particular form is prescribed by law for a warrant or execution, on behalf of the State, against a delinquent tax collector. A writ signed by the Treasurer, commanding the proper officer, "in the name of the State of Louisiana," is a sufficient compliance with the provision of sect. 6, art. 4, of the State constitution, in regard to the style of process.

Scarborough v. *Stevens*, 147.

2. The second section of the act of 20th March, 1816, requires that the property of a delinquent sheriff, which has been seized under execution issued by the Treasurer of the State, shall be sold for cash, and without appraisement. *Ib.*

3. Where a sheriff has received a tax roll and undertaken its collection, he must show that he has used due diligence. He cannot throw upon the State, the burden of proving that he actually received the amount. *Ib.*

4. Defendant, a sheriff, having received the tax roll, and given security for its collection, enjoined an execution issued against him by the Treasurer for the amount, on the ground that he had no legal authority to collect, no assessors having been appointed, nor assessment regularly made. There was no allegation or proof of any difficulty in making the collections in consequence of such pretended irregularity, nor any proof that defendant hesitated, on that account, to proceed with the collection. On a motion to dissolve the injunction: *Held*, that such illegality not having been objected by the tax payers, it is too late for the sheriff to interpose such an objection. *Ib.*

5. The law having provided the mode by which a sheriff, who has undertaken to collect the taxes, can obtain a credit for the amounts due from non-residents or insolvents, he will not be allowed, by enjoining an execution issued against him by the Treasurer, to retain such amounts. He must resort to the means pointed out by law, to establish the credit to which he is entitled. *Ib.*

6. Under the twenty-first sect. of the act of 27th March, 1813, a sheriff who fails to pay over, according to law, the taxes collected by him, will be entitled to no commission for their collection. *Ib.*

7. In a sale under execution, on a twelve months' credit, the sheriff is the agent of the party for whose benefit the sale is made, in taking bond from a purchaser. He is liable to the former if he accept insufficient, and to the latter if he refuse sufficient surety; and is, therefore, the proper judge of its sufficiency. *Wells* v. *Moore*, 154.

8. The sureties on a bond given by a sheriff for the collection of the parish taxes, cannot, when sued as sureties for a portion of the taxes collected but not paid over by the sheriff, contest the legality of the ordinances of the Police Jury making the assessment. By receiving the tax roll, and executing the bond, the sheriff and his sureties recognized the authority of the Police Jury. It is too late to contest the validity of their ordinances, after having acted under them, and collected the taxes. *M'Guire* v. *Bry*, 196.

9. Separate bonds may be taken from a sheriff for the collection of the state and parish taxes, though one bond would be sufficient. *Ib.*

10. Bond, in the sum of $8935, for the collection of the parish taxes, "agreebly to the assessment roll." The taxes for ordinary parochial purposes amounted to $3573 66, and there was a special tax, of an equal amount, collected for a particular purpose. In an action on the bond: *Held*, that the sureties were bound for both, it being improbable that a bond would be executed for $8935, to secure the payment of $3573 66 only. *Ib.*

11. Under the act of 28th February, 1837, actions against the sureties of a sheriff on his official bond, are prescribed by the lapse of two years.
Mulhollan v. *Henderson*, 297.

12. A sheriff has a right to retain possession of property sold by him, during the pendency of a rule to show cause why the sale should not be set aside.
Bayon v. *Breedlove*, 383.

See ATTORNEY, DISTRICT.

SHIPPING.

1. Parol evidence is admissible to prove an agreement to sell a vessel, anterior to the date of the written act of sale. *Bell* v. *Firemen's Insurance Company of New Orleans*, 423. *Bell* v. *Western Marine and Fire Insurance Co.*, 428.

2. One who has agreed to sell a vessel, but has neither delivered it nor received the price, has an insurable interest, the vessel being still at his risk.
Ib.

STATUTES, CITED, EXPOUNDED, &c.

I. *Statutes of the United States.*
II. *Statutes of the State.*
III. *Statutes of Mississippi.*
IV. *Statutes of New York.*

I. *Statutes of the United States.*

1790, May 26. Authentication of judicial proceedings of other States. *Succession of Bowles*, 33. *Reynolds* v. *Rowley*, 201. *Union Bank of Maryland* v. *Freeman*, 485.

1804, March 27. Authentication of records and exemplifications of office books, &c. of any public office, not appertaining to a court, of any State or territory. *Reynolds* v. *Rowley*, 201.

1805, March 2. Adjustment of land claims in territory of Orleans and district of Louisiana. *Eastman* v. *Beiller*, 220.

1806, February 28. Extending powers of Surveyor General, and relative to land claims in territory of Orleans and district of Louisiana. *Ib.*

——, April 21. Supplementary to act of 2 March, 1805, for the adjustment of land claims in territory of Orleans and district of Louisiana. *Ib.*

1807, March 3. Respecting claims to land in territories of Orleans and Louisiana. *Ib.*

1830, May 29, § 2. Pre-emption rights of settlers on public lands. *Downes* v. *Scott*, 84.

1834, June 19. Pre-emption rights of settlers on public lands. *Kellam* v. *Rippey*, 138. *Baillio* v. *Burney*, 317.

1838, June 22. Pre-emption rights of settlers on public lands. *Kellam* v. *Rippey*, 138.

1841, August 19. Establishing uniform system of bankruptcy. *Rasch* v. *His Creditors*, 407. *Fisher* v. *Vose*, 457.

Statutes of the State.

1806, June 7, § 18, 21. Penalty for keeping slaves without a white or free colored person as overseer. *State* v. *Linton*, 55.

1807, March 9. Emancipation of slaves. *Nolé* v. *De St. Romes*, 484.

1809, March 18, § 8. Amending Code of 1808—judge referred to in acts concerning minors. *Succession of Winn*, 303.

1810, March 24, § 7. Recording of notarial acts. *Lee* v. *Darramon*, 160.

1813, March 25, § 5. Powers of Police Juries. *McGuire* v. *Bry*, 196.

——— 26, § 1. Recording of certain acts—sales of land or slaves under *fi. fa.* *Lee* v. *Darramon*, 160.

——— 27, § 21. Taxes—collector of, failing to pay over, to lose his commissions. *Scarborough* v. *Stevens*, 47.

1816. March 14, § 4. City of New Orleans—Mayor, Recorder, Aldermen to lease or bid for any branch of revenue of. *Second Municipality of New Orleans* v. *Caldwell*, 368.

——— 20, § 2. Revenues of the State—execution against delinquent sheriff and sureties. *Scarborough* v. *Stevens*, 47.

——— § 18. Police Juries—ordinances of, how signed and promulgated. *McGuire* v. *Bry*, 196.

1817, February 22, § 21. Revenues of the State—commissions of prosecuting attorneys on amounts collected by them. *Scarborough* v. *Stevens*, 47.

1818, March 18. Creating offices of Surveyor General and Parish Surveyor. *Wells* v. *Compton*, 171.

1823, March 27, § 3. Attorneys—proceedings against, for fraudulent practice or other offences. *State* v. *Judge of First District*, 416.

1827, January 31. Emancipation of slaves. *Nolé* v. *De St. Romes*, 484.

——, March 13. Bills of exchange and promissory notes. *Duncan* v. *Sparrow*, 164, 167.

——— 20. Creating office of Register of Conveyances for New Orleans. *Lee* v. *Darramon*, 160.

1828, March 12. Repealing Civil Code of 1808, except chap. 3, title 10, book 1. *Noble* v. *Nettles*, 152.

——— 25, § 4. Amending Civil Code and Code of Practice—attachments, arrests, and sequestrations to be issued on filing bond and affidavit. *Briggs* v. *Spencer*, 265.

———, § 11. ——— registry of sheriff's sales. *Lee* v. *Darramon*, 160.

1828, March 25, § 7. Amending Civil Code and Code of Practice—service of interrogatories under a commission on opposite party. *Tollett* v. *Jones*, 274.

1830, March 15, § 21. Revenues of the State—sheriff's bonds for collection of taxes. *McGuire* v. *Bry*, 196.

1831, March 25, § 1. Amending Code of Practice—recusation of parish judge. *Ex parte Borden*, 399.

———, § 3. Injunctions. *Dabbs* v. *Hemken*, 123.

1833, February 9. Charter of New Orleans and Carrollton Rail Road Company. *Millaudon* v. *New Orleans and Carrollton Rail Road Co.*, 488.

1834, January 2, § 3. Presumption in actions for rescission of sales of slaves not eight months in the State. *Smith* v. *McDowell*, 430.

——, March 10, § 2. Advertisements of public sales. *Griffing* v. *Bo mar*, 113. *Beard* v. *Morancy*, 119.

———, § 2. Assurance of titles of purchasers at judicial sales. *Griffing* v. *Bowmar*, 113.

1835, April 1. Amending charter of the New Orleans and Carrollton Rail Road Co. *State* v. *New Orleans and Carrollton Rail Road Co.*, 418. *Millaudon* v. *Same*, 488.

1836, March 1. Amending act of 1 April, 1835, relative to charter of New Orleans and Carrollton Rail Road Co. *Ib.*, 418, 488.

1837, February 28. Prescription of actions against sheriff or his sureties. *Mulhollan* v. *Henderson*, 297.

——, March 11, § 2. Bail—release of. *State* v. *Martel*, 22.

——— 13. To expedite construction of New Orleans and Nashville Rail Road. *State* v. *Mexican Gulf Railway Co.*, 513.

1838, March 12. Amending act of 13 March, 1837, for expediting construction of New Orleans and Nashville Rail Road—loan to Mexican Gulf Railway Company. *Ib.*

1839, March 14. Relieving Banks from forfeitures of charter. *Millaudon* v. *New Orleans and Carrollton Rail Road Co.*, 488.

——— 20, § 3. Amending Code of Practice—summary proceedings against surety on attachment bond. *Wallace* v. *Glover*, 411.

——— § 19. —— defects, errors, and irregularities in appeals, time allowed to correct. *Lee* v. *Kemper*, 1. *Grand Gulf Rail Road and Banking Co.* v. *Douglass*, 169.

——— § 24. —— trial by jury in actions on unconditional obligations to pay certain sum, when allowed. *Smith* v. *Scott* 258.

——— § 6. Charter of Attakapas Canal Company through Lake Verret—authority to company to receive sum from New Orleans and Carrollton Rail Road Co. *State* v. *New Orleans and Carrollton Rail Road Co.*, 418.

1842, February 5. Reviving charters of Banks in New Orleans. *Ib.*
——, March 14. Liquidation of Banks. *Commissioners of the Atchafalaya Rail Road and Banking Co.* v. *Bean*, 414.
——— 26. Payment of notes due to Banks in liquidation—their own notes to be received in payment, when. *Ib.*

III. *Statutes of Mississippi.*

Authorizing stay of execution when property will not sell for two-thirds of appraised value. *Briggs* v. *Spencer*, 265.

IV. *Statutes of New York.*

Establishing rate of interest. Revised Statutes, Ed. 1836, Part II, Chap. IV, Tit. 3. *Sha* v. *Oakey*, 361.

SUBROGATION.

See SURETY, 1. 2. 12.

SUCCESSIONS.

I. *Jurisdiction in matters of Succession.*
II. *Of Executors, Administrators, and Curators.*
III. *Acceptance of Successions, and Rights and Responsibility of Heirs.*
IV. *Sale of Property of Successions.*
V. *Claims against Successions.*

I. *Jurisdiction in matters of Succession.*

1. Where the creditors of a succession are litigating their rights contradictori y with each other, and the value of the succession exceeds three hundred dollars, an appeal will lie to the Supreme Court, though the claim of each creditor may not amount to that sum. *Succession of Field*, 5.

2. Art. 996 of the Code of Practice, which authorizes actions for debts due from a succession to be brought before the ordinary tribunals, where the heirs, though all or some of them be minors, are in possession of the estate, should, perhaps, be confined either to heirs absolute, or to beneficiary heirs in possession of a succession after it has been fully administered. But where a succession appears to have had but few debts, and to have been administered to a certain extent, and to have been in the possession of the widow and heirs of the deceased for several years, an action to recover a debt due by it, may be brought before the courts of ordinary jurisdiction. *Porter* v. *Muggah*, 29.

3. Courts of Probate have exclusive jurisdiction of claims for money against successions administered by curators, executors, &c.; and all suits for money, pending before the ordinary tribunals, against one who dies leaving a vacant

succession, must be transferred to the Court of Probates of the place where his succession is opened. *Succession of Ludewig*, 92.

4. The first section of the act of 25th March, 1831, which provides that whenever the Parish Judge of any parish is disqualified by interest, or otherwise, to try any case in the Parish Court, that the District Court shall have jurisdiction thereof, and that the same shall be transferred by the Parish or Probate Court to the District Court, does not contemplate the transfer of all the mortuary proceedings and documents relative to any estate in which the Judge of Probates may be interested. The District Court may take cognizance of the appointment of a curator, where the Probate Judge is interested; but it is not necessary for this purpose, that the papers relative to the succession should be removed from their proper place of deposit.

Ex parte Borden, 399.

II. *Of Executors, Administrators, and Curators.*

5. In an action, by the purchaser, at a sale under execution, of the undivided shares of certain heirs in a succession, against the administrator, for paying over the amount to the heirs after notice, the defendant cannot set up any irregularity or nullity in the original proceeding against the heirs; the payment is at his peril, and he will be liable over to the purchaser.

Noble v. *Nettles*, 152.

6. The acknowledgment and payment by curators and executors, of debts due from the estates administered by them, are *prima facie* evidence of their correctness. When, from the extravagance of the charges, the unnecessary character of the supplies, or from any other circumstance, bad faith or dishonesty may be presumed, courts cannot be too strict; but where there is every appearance of good faith and correct management, such fiduciaries should not be held, in the settlement of their accounts, to the strictest rules of evidence. Were they obliged to prove the signatures to every receipt, the cost of the attendance of witnesses or of their depositions, would involve the estates in heavy and unnecessary expense.

Succession of Frantum, 283.

7. Full commissions of two and a half per cent on the productive property, may be allowed to an administrator, though the whole estate has not been fully administered by him. *Ib.*

8. Before delivering the whole estate into the hands of an universal heir, the executor has a right to require, that a sufficient sum be placed in his hands to pay the particular legacies. C. C. 1664. *Succession of Carraby*, 349.

See Courts, 8. Evidence, 21. 59. Partnership, 2.

III. *Acceptance of Successions, and Rights and Responsibility of Heirs.*

9. Heirs of age can accept a succession simply, or do acts rendering themselves unconditionally liable. Minors are necessarily beneficiary heirs.

Porter v. *Muggah*, 29.

10. The heirs should be informed of every act of an executor or creditor, which may charge or materially affect the property of a succession.

Succession of Bowles, 35.

11. Under art. 647 of the Code of Practice, the undivided share of an heir in a succession, may be seized and sold under execution. *Noble* v. *Nettles*, 152.

12. In an action, on an open account, against the heirs amongst whom a succession has been partitioned, for articles furnished to their ancestor, interest will be allowed from judicial demand, and not from the death of the ancestor. *Barney* v. *Brown*, 270.

13. Illegitimate children, though duly acknowledged, have no claim against the estate of their natural father, but for alimony. C. C. 224, 257, 913.

Liautaud v. *Baptiste*, 441.

14. The rights acquired by children legitimated by the subsequent marriage of their parents, have no effect against gratuitous dispositions, previously made by the latter. The legitimation has no retroactive effect. It operates only from the date of the marriage. C. C. 219, 948, 1556. *Ib.*

IV. *Sale of Property of Successions.*

15. A sale by the administrator of a succession of property held by the deceased, subject to a mortgage, gives the mortgagee no claim against the succession. His rights cannot be affected by such a sale; and he must pursue the property in the hands of the subsequent third possessor.

Succession of Field, 5.

16. Notice must be given to the forced heirs, of any application to sell the property of a succession in which they are interested. It may be to their interest to prevent a sale, by furnishing the means necessary to extinguish the debts and legacies. *Succession of Bowles*, 35.

17. An application by an executor for authority to sell a part of the effects of a succession, is in the nature of a rule to show cause; and it is only necessary that reasonable notice thereof should be given to the parties interested.

Ib.

18. The testator had bequeathed all his estate to his mother and one of his sisters. An order for a sale of the property having been procured by the executor, a sister of the deceased, to whom no part of the estate had been left, obtained an injunction to prevent the sale, and the curator of the testator's mother, an interdicted person, intervened in the suit, alleging that the latter was a forced heir recognized by the will, that the injunction was for her benefit as well as the plaintiff's, claiming part of the damages sued for, and praying to be allowed, with the consent of the plaintiff, to unite with the latter, and to pay a part of the costs. Answer by defendant to the petition of intervention, denying the right of the curator to intervene; and judgment dissolving the injunction, and ordering the executor to proceed with the sale. On an appeal by plaintiff and intervenor: *Held*, that the plaintiff, having no interest in the succession of the testator, had no right to interfere with its administration; and that no judgment having been rendered for or against the intervenor in the lower court, his appeal must be dismissed.

Field v. *Mathison*, 38.

19. The decree of the Court of Probates where the succession is opened, made in conformity to the advice of a family meeting, is necessary to authorize the sale of property belonging to minor heirs; and where such a decree has been made, the court will not look beyond it. *Beard* v. *Morancy*, 119.

20. Where a stranger to a succession withholds the price of property purchased at a sale of its effects, an action for the amount can be brought only before a court of ordinary jurisdiction. *Aliter*, where a legatee and universal heir seeks to avail himself of the privilege allowed by art. 1265 of the Civil Code, of retaining the price of property so adjudicated, until his share shall be fixed by a partition. The rights of a co-heir, who exercises this privilege, must be settled contradictorily with the other heirs, under the direction of the Court of Probates, whose decree must fix the portion coming to each. Until this be done, the heir who purchases keeps the purchase money as a kind of deposit, subject to the decision of the Court of Probates, which must determine what he is to pay over. The court which makes such a decree, must have authority to enforce obedience to it. *Succession of Carraby*, 349.

See EVIDENCE, 20. SALE, VIII.

V. *Claims against Successions.*

21. The provision of art. 984 of the Code of Practice, requiring the holder of any claim for money against a succession to present it to the curator or executor before commencing an action, is like the amicable demand to be made of a debtor before suit. Its omission may prevent the recovery of costs, but not that of the debt itself. *Fisk* v. *Friend*, 264.

SUMMARY PROCEEDINGS.

1. The surety in an attachment, though a resident of a different parish, may, under the third section of the act of 20th March, 1839, be proceeded against, summarily, before the court by which the original suit was decided. The object of that section was to authorize the court before which the action was instituted, to determine all questions, principal and incidental, raised in the course of the proceedings, and thus to secure a speedy adjustment of the rights of the plaintiff. *Wallace* v. *Glover*, 411.

2. Whenever a question arises out of a bail bond, it is incidental to the main action, and may be tried summarily, without instituting a new suit. *Ib.*

See EXECUTORY PROCESS.

SURETY.

1. Subrogation, whether legal or conventional, invests the person in whose favor it takes place, with all the rights, actions, privileges, and mortgages of the creditor against his debtor. *King* v. *Dwight*, 2.

2. One who has paid the debt due to a plaintiff, and been expressly subrogated to his rights, may take out execution against the defendant. Such an

express subrogation, is equivalent to an authority to use the plaintiff's name in prosecuting the suit for the recovery of the debt. *Ib.*

3. An accommodation endorser must be viewed in the light of a surety, and as such is entitled to discuss the property of his principal.
Dwight v. *Linton*, 57.

4. The purchaser of property sold under a *fi. fa.* on twelve months' credit, having offered defendants' testator to the sheriff as security for the price, received a blank bond from the sheriff to be signed by himself and the testator, and filled up on its return. The bond was signed, but not returned to the sheriff till after the death of the surety, which happened a few days after he signed the instrument, when it was filled up. *Held*, that the security having been previously approved by the sheriff, the contract was complete by the signature of the former. *Wells* v. *Moore*, 154.

5. The sureties on a bond given by a sheriff for the collection of the parish taxes, cannot, when sued as sureties for a portion of the taxes collected but not paid over by the sheriff, contest the legality of the ordinances of the Police Jury making the assessment. By receiving the tax roll, and executing the bond, the sheriff and his sureties recognized the authority of the Police Jury. It is too late to contest the validity of their ordinances, after having acted under them, and collected the taxes. *McGuire* v. *Bry*, 196.

6. Notice to a principal that, if he do not pay before a certain time, suit will be commenced against him, is not such an agreement for indulgence as precludes the party from suing, and thereby discharges the surety. *Ib.*

7. Bond, in the sum of $8935, for the collection of the parish taxes, "agreeably to the assessment roll." The taxes for ordinary parochial purposes amounted to $3573 66, and there was a special tax, of an equal amount, collected for a particular purpose. In an action on the bond: *Held*, that the sureties were bound for both, it being improbable that a bond would be executed for $8935, to secure the payment of $3573 66 only. *Ib.*

8. Where in an action against sureties who are bound jointly only, they claim in their answer the benefit of division, and it is not alleged that either is insolvent, the judgment must be against each for his virile portion. *Ib.*

9. A surety who binds himself with his principal, *in solido*, is not entitled to the benefit of discussion; and may be sued alone for the whole debt. His obligation must be regulated by the principles applicable to debtors *in solido*. C. C. 3014. *Smith* v. *Scott*, 258.

10. Under the act of 28th February, 1837, actions against the sureties of a sheriff, on his official bond, are prescribed by the lapse of two years.
Mulhollan v. *Henderson*, 297.

11. A prolongation of the term granted to the principal debtor, without the consent of the surety, will release the latter. C. C. 3032. *Calliham* v. *Tanner*, 299.

12. A surety, who pays the debt of his principal, is entitled to all the rights of the creditor against the latter; for, however desperate his situation may be at any particular time, it may improve, and offer, ultimately, complete indemnity. *Ib.*

13. A party, who seeks to render another liable for the debt of a third person, must prove such liability beyond all doubt, or he cannot recover. C. C. 3008. *Hazard* v. *Lambeth*, 378.

See ATTACHMENT, 4. BAIL.

SURVEY.

In all surveys, courses and distances must yield to natural and ascertained objects. *Wells* v. *Compton*, 171.

See EVIDENCE, 23.

SURVEYOR, PARISH.

1. Parish Surveyors are regularly appointed officers known to the law, and when dead, their declarations, taken in other suits, may be used, when necessary, as evidence to explain their acts. So plats made by a Parish Surveyor under orders of court, in a suit to which defendant was a party, are admissible after the decease of the former, to prove the declarations of the defendant made at the time of the survey. *Wells* v. *Compton*, 171.
2. The official acts and certificates of Parish Surveyors are entitled to full faith and credit, in all of the courts of this State. *Ib.*
3. The *procès-verbal* of a survey made by a Parish Surveyor, is legal evidence of the acts which it recites, as that notice was givin, that the parties attended, &c. *Ib.*

See EVIDENCE, 23.

TAX COLLECTOR.

See SHERIFF.

TRIAL.

Action for $90 paid to defendant, in error, as owner of a butcher's stall, and for $2000 damages for forcibly turning plaintiff out and retaining the possession of the stall. Plaintiff having obtained a rule on defendant to show cause why he should not be put in possession, it was made absolute, and defendant appealed. *Held*, that the court erred in ordering a part of the case to be tried on a rule, and leaving the remainder untried. A case should not be tried on any other day than the one fixed by the court, when called in its turn. C. P. 463.

Gerber v. *Marzoni*, 370. *Beaudouin* v. *Rochebrun*, 372.

See NEW TRIAL.

TUTOR.

See MINOR.

UNITED STATES, OFFICERS OF.

A rule cannot be taken on an officer of the United States, in his official capacity, to show cause why he should not pay over money, seized in his hands under a *fi. fa.*, as the property of a third person. To condemn him to pay as an officer, would be to condemn the government, which cannot be done. *Mechanics and Traders Bank of New Orleans* v. *Hodge*, 373.

VERDICT.

See APPEAL. 40. JURY, 1. 2. 4. 7.

WARRANTY.

See SALE, 12. 13. 14. 15. 22.

WILL.

See DONATIONS, II. III.

END OF VOLUME III.

ERRATA.

Page 1, line 18 from top, for *applicant*, substitute *appellant*.
" 26, " 6 " *places*, " *place*.
" 94, " 14 " *services*, " *service*.
" 326, " 12 " *rendered*, " *tendered*.
" 420, " 10 " 6*th*, " 5*th*.
" 489, " 29 " insert *each* after *share*.
" 492, " 5 " for 6*th April*, 1833, substitute 9*th Febuary*, 1833.